TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953 54

No. 36

UNITED STATES OF AMERICA, APPELLANT,

vs.

LEE SHUBERT, JACOB J. SHUBERT, MARCUS HEIMAN, UNITED BOOKING OFFICE, INCORPORATED, SELECT THEATRES CORPORATION, L.A.B. AMUSEMENT CORPORATION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED MARCH 18, 1954

Probable jurisdiction noted April 26, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 647

UNITED STATES OF AMERICA, APPELLANT,

vs.

LEE SHUBERT, JACOB J. SHUBERT, MARCUS HEIMAN, UNITED BOOKING OFFICE, INCORPORATED, SELECT THEATRES CORPORATION, L.A.B. AMUSEMENT CORPORATION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

INDEX

1-2 IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Stipulation re substitution of copy of complaint and ruling thereon—(omitted in printing).

3 IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 56-72

UNITED STATES OF AMERICA, PLAINTIFF,

v.

LEE SHUBERT, JACOB J. SHUBERT, MARCUS HEIMAN, UNITED BOOKING OFFICE, INCORPORATED, SELECT THEATRES CORPORATION L.A.B. AMUSEMENT CORPORATION, DEFENDANTS

COMPLAINT—Filed February 21, 1950

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings his action against the defendants named herein and complains and alleges as follows:

I

Jurisdiction and Venue

1. This complaint is filed and these proceedings are instituted against the defendants under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", commonly known as the Sherman Act, in order to prevent and restrain continuing violations by the defendants, as hereinafter alleged, of Sections 1 and 2 of the Sherman Act.

2. All the defendants inhabit, maintain their principal offices, transact business, and are found within the Southern District of New York.

4 II

Description of Defendants

3. Lee Shubert and Jacob J. Shubert (hereinafter referred to as the Shuberts) are made defendants herein. The Shuberts are brothers and are residents of the City of New York, New York.

Through the defendant Select Theatres Corporation and other corporations controlled by them, the Shuberts operate or participate in the operation of approximately 37 theatres in various States of the United States, produce and invest in numerous legitimate attractions, and own and rent rights to various attractions. The Shuberts together with the defendant Marcus Heiman are in active charge of the management, direction, and operation of the defendant United Booking Office, Incorporated. Lee Shubert is vice-president and a director of the defendant United Booking Office, Incorporated.

4. Marcus Heiman, a resident of the City of New York, New York, is made a defendant herein. Through the defendant L.A.B. Amusement Corporation and other corporations in which he has a financial interest, Marcus Heiman operates or participates in the operation of five theatres in various States of the United States and has invested in numerous legitimate attractions. Marcus Heiman together with the defendants Lee Shubert and Jacob J. Shubert is in active charge of the management, direction, and operation of the defendant United Booking Office, Incorporated. Marcus Heiman is president and a director of the defendant United Booking Office, Incorporated.

5. United Booking Office, Incorporated (hereinafter referred to as UBO) is made a defendant herein. UBO is a corporation organized and existing under the laws of the State of New York and has its principal place of business at 234 West 44th Street, in the City of New York, New York. With the exception of the defendant Select Theatres Corporation and its subsidiary, Select Operating Corporation, UBO is the only booking office in the United States engaged in the business of booking legitimate attractions in theatres throughout the United States. It has also engaged in the financing of the production of many attractions. UBO has outstanding 500 shares of capital stock of which 250 shares are owned by the defendant Marcus Heiman and 250 shares by the defendant Select Theatres Corporation. The defendants Marcus Heiman, Lee Shubert, and Jacob J. Shubert are in active charge of the management, direction, and operation of UBO.

6. Select Theatres Corporation (hereinafter referred to as Select) is made a defendant herein. Select is a corporation organized and existing under the laws of the State of New York and has its principal place of business at 234 West 44th Street, in the City of New York, New York. It has approximately 19 subsidiary companies and 4 affiliated companies, some of which are presently inactive. Select and its subsidiaries operate approximately 19 theatres in various States of the United States. Select, directly and through subsidiary corporations, arranges bookings for several theatres in its chain, produces and invests in the production of legitimate attractions, and owns and rents rights to various attractions. The defend-

ants Lee Shubert and Jacob J. Shubert own all the preferred stock and over 80% of the common stock of Select and are in active charge of its management, direction, and operation.

7. L.A.B. Amusement Corporation (hereinafter referred to as LAB) is made a defendant herein. LAB is a corporation organized and existing under the laws of the State of New York and has its principal place of business at 234 West 44th Street, in the City of New York, New York. It operates three theatres in three States and has invested in the production of numerous legitimate attractions. The defendant Marcus Heiman owns all the stock of LAB and is in active charge of its management, direction, and operation.

III

Definition of Terms

8. Each of the following terms as used herein has the meaning described below:

9. *Legitimate attractions*—stage attractions performed in person by professional actors. Such attractions include plays, musicals, and operettas. The term ordinarily does not include stock company attractions, vaudeville, burlesque, bands, individual dancers, dance groups, concerts, and vocal or instrumental presentations.

10. *Theatre*—a theatre which customarily presents legitimate attractions.

11. *Producer*—any person, partnership, association or corporation engaged in the production of legitimate attractions.

12. *Presentation*—the operation of a theatre or theatres and the exhibition of legitimate attractions therein.

13. *Operator*—any person, partnership, association or corporation engaged in presentation.

14. *Booking*—the arrangements, generally made through a booking office, between producers and operators for the routing and presentation of legitimate attractions and the fixing of playing dates. The term includes entering into agreements for the presentation of legitimate attractions.

15. *Shubert-operated theatre*—a theatre which is owned or operated by the defendants Shuberts or either of them or by any of the corporations controlled by them.

7 16. *Heiman-operated theatre*—a theatre which is owned or operated by the defendant Marcus Heiman or by any of the corporations controlled by him.

17. *Franchise*—a contract between an operator and the defendant UBO whereby UBO is appointed exclusive booking agent for the operator.

18. *Affiliated theatre*—a theatre which had or has a franchise with the defendant UBO or a similar working arrangement with any of

the defendants herein or with any of the corporations controlled by them.

19. *Independent theatre*—a theatre which is not an affiliated theatre or in which the defendants have no financial interest.

20. *Try-out town*—a city where a legitimate attraction is presented for the purpose of judging audience reaction and eliminating observed deficiencies, prior to presentation in New York City.

21. *Road-show town*—a city where a legitimate attraction is presented after its presentation in New York City. A road-show town may also be a try-out town.

22. *Theatrical season*—the period from September of one year through May of the next.

IV

Description of the Business

23. The three branches of the legitimate theatre business herein relevant are production, booking, and presentation.

24. Production involves (1) the assembling of the elements of a legitimate attraction, including a script, financial backing, actors, stage hands, designers, advertising agents, scenery, costumes, lighting and music; (2) rehearsing, to weld the parts into a legitimate attraction suitable for presentation; (3) arranging for the booking and presentation of the attraction in a try-out town or towns;
8 in New York City; and in road-show towns; and (4) transporting the entire cast and scenery to try-out towns, New York City and road-show towns throughout the United States to fulfill these bookings and presentation arrangements.

25. At the present time a play costs approximately $60,000 to $100,000 to produce, whereas a musical generally requires from $200,000 to $300,000. As much as one-third of the cost may be attributable to expenditures for scenery, props and related items and services. The producer usually does not invest money in his own attraction but finances it almost entirely with risk capital. The producer often incorporates the legitimate attraction as a separate venture and sells shares of stock therein to investors, or he may organize a limited partnership with the investors sharing in the venture. The producer usually begins to share in the profits only after the investors are paid back their total investments, after which the profits are generally divided 50% to the producer and 50% to the investors.

26. When rehearsals are completed, the producer arranges for the presentation of the attraction for a period of one to four weeks in a theatre in one or more try-out towns. Key try-out towns are Boston, Massachusetts; Philadelphia, Pennsylvania; Baltimore, Maryland; and New Haven, Connecticut. Until recently, when its last remaining theatre was converted into a motion-picture house, Washington,

D. C. was also a key try-out town. The reaction of audiences in try-out towns is important in gauging the attraction's financial success on subsequent presentations in New York City and road-show towns.

27. If the try out is satisfactory, the attraction is then presented in a theatre in New York City. To return any profit an attraction must generally run in a New York City theatre for a minimum of twenty weeks; to be considered a hit it must usually play to capacity or near capacity audiences in that city for a full theatrical season. If the New York City run is successful, the producer sends the attraction on tour to road-show towns throughout the United States. This road-show tour, which may be made by one or more companies, is an integral part of the exploitation of the attraction and a substantial part of its profits are so obtained.

28. The defendant UBO acts as middleman between producers and the operators of theatres in try-out and road-show towns. The booking of legitimate attractions involves the fixing of playing dates in various theatres and the cross-country routing of attractions, in a constant stream, to and from theatres in various cities throughout the United States. Although services are performed for both producers and operators, by custom and usage the defendant UBO is regarded as the agent of, and receives payment from, the operator. Generally, the producer and the operator divide the gross theatre admission receipts on a stipulated percentage basis. The defendant UBO usually receives for its services 5% of the operator's share of the gross receipts.

29. With the exception of a few cities a legitimate attraction ordinarily cannot profitably play in any one road-show town for more than a limited period of time, seldom exceeding two weeks. Therefore, successful operation of a theatre in a road-show town requires the presentation of a series of legitimate attractions so scheduled as to keep the theatre as continuously occupied as possible during the theatrical season. The producer, on the other hand, because of the fact that he cannot keep his attraction in any one road-show town for more than a short time, must play in a number of road-show towns during the tour. For a profitable tour, the producer must obtain a series of suitable road-show playing dates so arranged as to minimize lay-offs and travel between engagements. In view of these considerations, playing dates of the producer and operator must be coordinated to permit each to meet his requirements.

30. The defendant UBO, generally before the beginning of each theatrical season, enters into or renews arrangements with operators throughout the United States to act as their agent in the booking of legitimate attractions. A producer seeking bookings consults the

defendant UBO which thereupon examines its various schedules to determine the available open time at theatres suitable for the attraction. Normally, after considerable negotiation with the producer, the defendant UBO "pencils in" playing dates for the attraction and then notifies the operators accordingly. Subsequently contracts are entered into covering the presentation of the attraction at various theatres throughout the United States.

31. Booking in New York City differs from booking in try-out and road-show towns. Independent theatres in New York City are ordinarily booked through direct negotiation between producer and operator. Shubert-operated theatres in New York City are booked by an agent of the Shuberts who is also one of the two booking managers for the defendant UBO.

32. Playing dates for theatres in try-out and road-show towns are generally for a fixed period of time, after which the attraction is moved to another town. On the other hand, in New York City an attraction is booked to run indefinitely, provided it grosses a specified amount each week. This provision is known as a "stop clause." If the attraction grosses less than the minimum in the "stop clause," either party has the option of removing the attraction from the theatre after prescribed notice has been given.

11 33. The operator enters into a contract with the producer to make his theatre (whether located in a try-out or a road-show town or in New York City) available to the producer for a specified legitimate attraction. Usually the operator receives his compensation in the form of a percentage, varying from 20% to 40% of the total gross theatre admission receipts. However, in many instances the operator will insist that the producer guarantee payment of a minimum sum. The operator furnishes the theatre, including light, heat, and a limited number of service personnel, and in conjunction with the producer prepares the legitimate attraction for presentation in the theatre. In addition, the operator may pay all or part of the cost to "take-in" and set up the scenery and paraphernalia, as well as furnish a limited number of stage-hands and musicians. When the engagement is concluded the operator may pay part or all of the cost of "taking-out" the scenery and paraphernalia and preparing same for shipment to the next theatre. The operator may also pay part of the cost for advertising the attraction. The producer, on the other hand, usually must bring with him and furnish all the necessary scenery, costumes, props, and special lighting effects, together with a complete cast. The producer also provides advertising material prior to the presentation of the attraction and must provide personnel in addition to those provided by the operator.

34. Operators outside of New York City are financially dependent upon a steady flow of legitimate attractions. Theatres in try-out

and road-show towns supply a market for legitimate attractions which is of vital importance to the profitable presentation and exploitation of such attractions. Moreover, theatres in road-show towns provide an opportunity for the producer of a popular attraction to have access to the widest possible market.

12

V

Position of the Defendants in the Business

A. Production

35. For a number of years the defendants Shuberts and corporations controlled by them engaged in both the production of their own legitimate attractions and the financing of attractions of other producers. At the present time their production activities are concentrated largely in the latter field. The defendant Heiman and corporations controlled by him likewise engage in the financing of the production of legitimate attractions.

36. The defendants, moreover, have entered into various arrangements with the Theatre Guild, Inc., one of the leading producers of legitimate attractions in the United States, which arrangements are approximately as follows: The Guild customarily presents three of its own productions and three outside productions during each theatrical season. Tickets for these attractions are sold on a subscription basis on behalf of the Guild by the American Theatre Society and such sales represent a substantial portion of the box office receipts. This Society, through a play selection committee, also selects those attractions which are to be included in the subscription season of the Guild. The public, in reliance on the Guild's selection of legitimate attractions, pays large sums of money in various cities of the United States for subscriptions therefor. The defendants Shuberts and Heiman own a substantial block of stock in the American Theatre Society, and the defendants Lee Shubert and Heiman comprise two of the four members of its play selection committee. The defendants Shuberts and Heiman have also made substantial investments in Guild productions.

13 *B. Booking*

37. The defendants Shuberts and Heiman control the booking of legitimate attractions in try-out and road-show towns throughout the United States. Furthermore, the defendants Shuberts control the booking of approximately 50% of the theatres in New York City.

38. Prior to 1932, when the defendant UBO was organized, two booking offices, both located in New York City, were available for the booking of legitimate attractions in try-out and road-show towns. These were the Klaw-Erlanger office, controlled by the

Erlanger family, and the Shubert office, controlled by the Shuberts. Each booked primarily into its own chain of theatres. In or about 1928, the defendant Heiman became a partner in the Erlanger theatre interests, including a share in the Klaw-Erlanger booking office. In 1931 the Shubert Theatre Corporation went into receivership, the defendant Lee Shubert and the Irving Trust Company being appointed receivers. In or about August 1932, the Klaw-Erlanger booking office and the Shubert booking office were merged, the resulting combination being known as the United Booking Office, Incorporated. UBO issued five hundred shares of stock; of these Lee Shubert and the Irving Trust Company, as receivers, obtained 250 shares, and Leonard Bergman, a member of the Erlanger family, obtained the other 250. On May 3, 1933, Heiman acquired 125 shares of this stock from Bergman and on March 17, 1944, the other 125 shares. Prior to this last transfer Heiman represented both his own interests and those of Bergman in UBO. In the interim, the Shuberts organized Select which purchased from the receivers the entire assets of the Shubert Theatre Corporation, including 250 shares of UBO stock. The formal transfer of UBO stock to Select occurred on June 30, 1933. Thus, the stock of UBO is now owned 50% by Heiman and 50% by the Shuberts, through Select.

14 39. For a number of years Heiman has been the president and one of the four directors of UBO. Lee Shubert is vice-president and director. Of the other two officers of UBO, one is an associate of the Shuberts, the other an associate of Heiman. Likewise, of the remaining two directors of UBO, one is a nominee of Heiman, the other a nominee of the Shuberts. UBO also employs two booking managers, Augustus Pitou and Elias Weinstock. Pitou was formerly connected with the Klaw-Erlanger office and is the Heiman representative in UBO. In addition to his booking duties, Pitou has overall supervision of the Heiman-operated theatre in Boston, Massachusetts and of the Heiman-operated theatre in Pittsburgh, Pennsylvania; the latter theatre, the Nixon, was sold in 1948 by Heiman to make way for an office building and is scheduled for demolition in 1950. The other booking manager of UBO, Elias Weinstock, is the Shubert representative in UBO, having occupied that position since 1939 when his predecessor, Jules Murry, died. Weinstock spends approximately half his time booking for UBO and devotes the remainder of his working for the Shuberts. He books legitimate attractions for several Shubert-operated theatres in try-out and road-show towns and for all the Shubert-operated theatres in New York City. He also manages the Shubert-operated Booth Theatre in New York City.

40. In 1932 the defendants adopted a policy whereby UBO entered into franchise agreements with operators of theatres in various road-show towns throughout the United States where the defendants themselves did not operate theatres. Under each of these agreements

the operator appointed UBO exclusive booking agent for the booking of legitimate attractions into the theatre and agreed to pay UBO a fee of 5% of his share of the gross receipts from all legitimate attractions presented at the theatre during the period of the franchise. The operator usually agreed not to transfer his interest
15 in the theatre without consent of UBO and UBO in return agreed to use its best efforts to book for the theatre during the period covered by the franchise. It was also generally understood by the parties that if UBO granted a franchise to an operator in a particular town, it would not thereafter, during the period of the franchise, grant a second franchise to another operator in the same town. At the outset franchises covered periods varying from one to five years. Subsequently, UBO limited these franchises to a period of one year and usually negotiated new ones or renewals prior to each theatrical season. In or about 1946 UBO discontinued formal franchise agreements and adopted in lieu thereof a system of listings, whereby it was tacitly understood between the parties that they would continue the previous arrangements without a written contract.

C. Presentation

41. The defendants, as will hereinafter be described, are the only operators of theatres in virtually all key try-out towns and in several important road-show towns. In addition, approximately 50% of all the theatres in New York City are Shubert-operated theatres.

42. The defendants operate or participate in the operation of approximately 40 theatres in eight States. The distribution of these theatres is as follows:

City	*No. of Theatres*
Baltimore, Md.	1
Boston, Mass.	6
Chicago, Ill.	7
Cincinnati, Ohio	1
Detroit, Mich.	2
Los Angeles, Calif.	1
New York, N. Y.	17
Philadelphia, Pa.	4
Pittsburgh, Pa.	1
Total	40

16 A. *Baltimore.* The only theatre in this city at the present time is Ford's Theatre, which is leased and operated by UBO. Select, through a wholly-owned subsidiary, guarantees 50% of the obligations of UBO under the lease, and the other 50% is guaranteed by LAB.

B. *Boston.* There are six theatres in this city, all of which are controlled by the defendants. Four are Schubert-operated theatres as follows: Copley, Opera House, Plymouth, Shubert. Heiman, through LAB, operates the Colonial. In addition, the Shuberts and Heiman jointly operate the Wilbur Theatre.

C. *Chicago, Illinois.* There are nine theatres in this city, all but two of which are operated by the defendants. Six as Shubert-operated theatres, as follows:

Blackstone
Great Northern
Harris
Selwyn
Shubert
Studebaker

Heiman, through LAB, operates the Erlanger Theatre.

D. *Cincinnati, Ohio.* The only theatre in this city is the Cox, which is a Shubert-operated theatre.

E. *Detroit, Michigan.* There are three theatres in this city. Of these, the Shuberts have an interest in the operation of two, namely the Cass and the Shubert-Lafayette.

F. *Los Angeles, California.* The only threatre in this city is the Biltmore, which is a Heiman-operated theatre.

G. *New York City, New York.* There are thirty-two theatres in this city. Of these, at least fifteen are Shubert-operated theatres, as follows:

Barrymore
Booth
Broadhurst
Broadway
Century
Cort
Golden
Imperial
Majestic
National
Plymouth
Royale
St. James
Shubert
Winter Garden

17 The Shuberts also own one-third of the stock of the corporation which operates the Music Box Theatre, and have the exclusive booking rights for, and a one-third interest in the Lyceum Theatre.

H. *Philadelphia, Pennsylvania.* There are four theatres in this city, all of which are Shubert-operated theatres. These theatres are the Forrest, Locust, Shubert and Walnut Street.

I. *Pittsburgh, Pennsylvania.* The only theatre in this city is the Nixon, which is a Heiman-operated theatre. The theatre was sold in 1948 to make way for an office building, and it is scheduled for demolition in 1950.

43. In New Haven, Connecticut, there is only one theatre, the Shubert, which for a number of years prior to 1941 was a Shubert-operated theatre. It became an affiliated theatre in 1941 when a new corporation took over the lease and operation of the theatre under an agreement with a subsidiary of Select, whereby the operator agreed to accept only attractions booked through said subsidiary. This agreement was renewed in 1946 for a period of five years.

44. In Washington, D. C. there is at the present time no theatre. For a number of years two theatres in this city were available for the presentation of legitimate attractions, the Belasco and the National, both controlled by the defendants. By design and agreement of the defendants the Belasco was kept "dark" for a number of years so as to eliminate competition. In 1948 the defendant Heiman converted the National into a motion-picture house, despite the fact that Washington, D. C. is acknowledged to be one of the most desirable cities in the United States for the presentation of legitimate attractions. Other persons desiring to operate a theatre in Washington, D. C. have been unable to obtain a commitment from the defendants with respect to securing legitimate attractions, hence, making it difficult, if not impossible, for a person independent
18 of the defendants to operate a theatre in Washington, D. C.

45. In Toledo, Ohio, there is only one theatre, the Town Hall, which is owned by the Shuberts. In 1947, this theatre became an affiliated theatre when it was leased by the Shuberts under an agreement granting exclusive booking rights to UBO.

VI

Interstate Commerce

46. The business of producing legitimate attractions for presentation in try-out towns, New York City, and road-show towns involves the securing of actors, scenery, costumes, appropriate lighting, music and other paraphernalia, then the welding of all the parts into presentable form through rehearsals, generally in New York City. When the rehearsals are completed, the entire cast and the scenery, costumes, lighting, music, and other paraphernalia are transported across State lines to a key try-out town such as Boston, Massachusetts; Philadelphia, Pennsylvania; Baltimore, Maryland; or New Haven, Connecticut. The try-out performances are an essential part of the fashioning of a successful vehicle for presentation in New York City and in road-show towns. If the attraction is successful in the try-out town, the cast and the scenery, costumes, lighting, music and other paraphernalia are then transported to New York City for presentation. If that presentation is successful, the actors and the above-mentioned essential and costly equipment are then transported across various State lines on a road-show tour

to various cities in the United States. The road-show tour of a successful legitimate attraction is an integral part of the over-all presentation.

47. As a necessary part of the fulfillment of booking contracts, legitimate attractions must go from State to State, staging performances here and there and fulfilling their contracts as much by the interstate movement as by the acting.

48. In the usual course of producing, booking, and presenting legitimate attractions there is a continuous flow of applications, letters, memoranda, communications, money, checks, drafts and other media of exchange from operators and other persons in various States of the United States across State lines to the defendants in New York City. Likewise, there is a continuous flow of memoranda, letters, commitments, contracts, and communications from the home offices of the defendants in New York City across State lines to operators and other persons in various States of the United States.

49. In the course of producing, booking and presenting legitimate attractions, there is a constant, continuous stream of trade and commerce between the States of the United States, consisting of the assemblage of personnel and property for rehearsals, the transportation of said personnel and property to various cities throughout the United States, the making and performing of contracts under which attractions are routed and presented in various States of the United States, and the transmission of applications, letters, memoranda, communications, commitments, contracts, money, checks drafts and other media of exchange across State lines.

VII

Offenses Charged

50. The defendants for many years last past, have been and now are engaged in a combination and conspiracy in restraint of the aforesaid interstate trade and commerce in the production, booking and presentation of legitimate attractions, and have combined and conspired to monopolize, and have attempted to monopolize and have monopolized the aforesaid interstate trade and commerce in the booking of legitimate attractions throughout the United States and in the presentation of legitimate attractions in Baltimore, Maryland, Boston, Massachusetts; Chicago, Illinois; Cincinnati, Ohio; Detroit, Michigan; Los Angeles, California; New York City, New York; Philadelphia, Pennsylvania; Pittsburgh, Pennsylvania; and Washington, D. C., in violation of Sections 1 and 2 of the Sherman Act. The defendants threaten to continue such offenses, and will continue them, unless the relief hereinafter prayed for in this complaint is granted.

51. The aforesaid combinations and conspiracies to unreasonably restrain and to monopolize trade and commerce, the attempts to monopolize and the monopolizations of trade and commerce have consisted of a continuing concert of action among the defendants, the substantial terms of which have been that the defendants: (a) compel producers to book their legitimate attractions exclusively through the defendants; (b) exclude others from booking legitimate attractions; (c) prevent competition in the presentation of legitimate attractions; (d) discriminate in favor of their own productions with respect to booking and presentation; and (e) combine their power in booking and presentation in order to maintain and strengthen their domination in each of these fields.

52. Pursuant to said combinations and conspiracies, attempts to monopolize and monopolizations, the defendants have done the things they agreed to do, by the following means, among others:

(a) Conditioned their investments in the productions of legitimate attractions by others upon agreements by the producers to book each of those attractions exclusively through the defendants;

(b) Booked substantially all legitimate attractions produced by the defendants;

(c) Forced producers to grant to the defendants the exclusive right to book the legitimate attractions of said producers for an entire theatrical season;

21 (d) Conditioned the booking of legitimate attractions into theatres in try-out towns upon agreements by the producers to book each of those attractions exclusively through the defendants thereafter;

(e) Conditioned the booking of legitimate attractions into Shubert-operated theatres in New York City upon agreements by the producers to book each of those attractions exclusively through the defendants thereafter;

(f) Coerced producers who had booked independently of the defendants to pay penalties or to accept unfavorably discriminatory booking terms, as a condition of obtaining bookings through them;

(g) Entered into agreements with operators whereby said operators agreed to present only attractions booked through the defendants and defendants agreed not to book for competing operators;

(h) Excluded legitimate attractions booked independentiy of the defendants from theatres operated by them and from affiliated theatres;

(i) Excluded legitimate attractions booked through the defendants from theatres competing with affiliated theatres or with those operated by the defendants;

(j) Harassed operators of competing theatres;

(k) Coerced and intimidated independent theatre operators located in towns where the defendants operated theatres, or where they desired to operate theatres, to relinquish control of their theatres or a share of the profits thereof, by expressed or implied threats to deprive them, by virtue of the defendants' control of booking, of access to legitimate attractions;

(l) Acquired control of the operation of competing theatres.

22 VIII

Effects

53. The concerted action of the defendants pursuant to and in furtherance of the violations of law alleged in this complaint have had, among others, the following effects:

(a) Producers have been forced to book exclusively with the defendants, on non-competitive terms, in order to obtain access to suitable theatres;

(b) Persons have been denied the right to engage in the business of operating a booking office in competition with the defendants;

(c) Operators of independent theatres in cities where the defendants operate theatres, or where affiliated theatres are located, have been systematically excluded from obtaining legitimate attractions;

(d) In many cities where the defendants operate theatres, or where affiliated theatres are located, operators of independent theatres have been forced out of the business of presenting legitimate attractions;

(e) Persons have been denied the right to engage in the business of presenting legitimate attractions in cities where the defendants operate theatres, or where affiliated theatres are located;

(f) In cities where the defendants operate theatres, or where affiliated theatres are located, the public has been deprived access to legitimate attractions and the benefits which flow from free enterprise and open competition;

(g) The interstate commerce in production, booking, and presentation has been unreasonably restrained and the interstate commerce in booking and presentation has been monopolized.

23 *Prayer*

WHEREFORE, plaintiff prays:

(1) That the Court adjudge and decree that the defendants, and each of them, have combined and conspired to unreasonably restrain and to monopolize trade and commerce, have attempted to monopolize and have monopolized trade and commerce, as hereinbefore alleged, in violation of Sections 1 and 2 of the Sherman Act.

(2) That the defendants herein, their subsidiaries, and each of them, and each and all of their respective officers and directors, and each and all of their respective agents, servants and employees, and all persons acting or claiming to act on behalf of the defendants, their subsidiaries, or any of them, be perpetually enjoined and restrained from continuing to carry out, directly or indirectly, expressly or impliedly, the combinations and conspiracies to unreasonably restrain and to monopolize trade and commerce, the attempts to monopolize and the monopolizations of trade and commerce, as hereinbefore alleged, in the production, booking and presentation of legitimate attractions, and any similar conspiracies, attempts to monopolize, or monopolizations.

(3) That the Court adjudge and decree that the integration by the defendants of the production, booking and presentation branches of the legitimate theatre business has been used unlawfully as an instrumentality of monopoly and restraint upon interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Act.

(4) That the Court adjudge and decree that the defendants have used their interest in and control of presentation and booking to restrain trade and commerce in the production of legitimate attractions in violation of Section 1 of the Sherman Act.

(5) That the Court adjudge and decree that the defendants have used their interest in and control of presentation and their interest in production to restrain and to monopolize trade and commerce in the booking of legitimate attractions in violation of Sec-
24 tions 1 and 2 of the Sherman Act.

(6) That the Court adjudge and decree that the defendants have used their interest in and control of presentation and booking and their interest in production to restrain and to monopolize trade and commerce in the presentation of legitimate attractions in violation of Sections 1 and 2 of the Sherman Act.

(7) That the Court

(a) order and direct the defendants to divest themselves of all interest in either the booking branch or the presentation branch of the business, under terms and conditions which will assure that no divested interest or no retained interest will be used in restraint of trade, and retain jurisdiction for the effectuation of its order;

(b) perpetually enjoin and restrain each of the defendants from acquiring any interest in that branch of the business so relinquished; and

(c) order and direct the defendants, and each of them, (in the event that the Court permits the defendants, or any of them, to engage in presentation) to divest themselves of all interest and ownership in such theatres as may be necessary to dissipate the effects of the unlawful activities hereinbefore alleged, and to restore competition in such trade and commerce; and that the Court perpetually enjoin and restrain said defendants from acquiring any interest in any theatre except upon a showing to the Court that such acquisition will not unreasonably restrain the trade and commerce in the presentation of legitimate attractions in any section or community, or tend to create a monopoly in that line of commerce.

25-67 (8) That the plaintiff have such other relief as the Court may deem appropriate in order to prevent restraints of trade and commerce, attempts to monopolize and monopolizations in any branch of the business in which defendants may hereafter be engaged.

(9) That the plaintiff recover its costs herein.

Dated: Feb. 21, 1950.

(S.) J. HOWARD MCGRATH,
Attorney General.
(S.) HERBERT A. BERGSON,
Assistant Attorney General.
(S.) IRVING H. SAYPOL,
United States Attorney.
(S.) MELVILLE C. WILLIAMS,
Chief, New York Office.

(S.) RICHARD K. DECKER,
(S.) HERBERT N. MALETZ,
(S.) HAROLD LASSER,
(S.) HENRY M. STUCKEY,
(S.) VICTOR A. ALTMAN,
(S.) ESTELLA L. BALDWIN,
Attorneys for the United States.

68-70 In the United States District Court for the Southern District of New York

[Title omitted]

MOTION TO DISMISS COMPLAINT—Filed December 10, 1953

Defendants move the Court for judgment dismissing the complaint for the reasons (1) that the Court does not have jurisdiction of the subject matter of the action and (2) that the complaint does not state a claim upon which relief can be granted.

Dated November 24, 1953.

CRAVATH, SWAINE & MOORE,
By ALFRED MCCORMACK,
a member of the Firm,
Attorneys for Defendants,
15 Broad Street,
New York 5, N. Y.

To:

PHILIP MARCUS, ESQ.,
Special Assistant to
the Attorney General.

——— ———,
United States Attorney,
Southern District of New York.

——— ———,
Clerk of the Court.

71 In the United States District Court for the Southern District of New York

[File endorsement omitted]

Civil Action No. 56-72

UNITED STATES OF AMERICA, PLAINTIFF,

against

LEE SHUBERT, JACOB J. SHUBERT, MARCUS HEIMAN, UNITED BOOKING OFFICE, INCORPORATED, SELECT THEATRES CORPORATION, L.A.B AMUSEMENT CORPORATION, DEFENDANTS.

OPINION—December 30, 1953

PHILIP MARCUS, ESQ.,
Special Assistant to the Attorney General,
Attorney for Plaintiff.
KLEIN & WEIR, ESQS.,
Attorneys for defendants, Lee Shubert, Jacob J. Shubert and Select Theatres Corporation.
CRAVATH, SWAINE & MOORE, ESQS.,
Attorneys for defendants, Marcus Heiman and United Booking Office, Inc.
LIPPER, SHINN & KEELEY, ESQS.,
Attorneys for defendant,
L.A.B. Amusement Corporation.
KNOX, C. J.

December 1953.

72-74 KNOX, C. J.

In principle, I can see no valid distinction between the facts of this case and those which were before the Supreme Court in the cases of *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U. S. 200, and *Toolson* v. *New York Yankees, et al*, decided by the Supreme Court on November 9, 1953.

Upon the authority of these adjudications the complaint in the above entitled action will be dismissed.

December 30, 1953.

JNO. C. KNOX,
Chief Judge.

75 IN THE UNITED STATES DISTRICT COURT

DOCKET ENTRIES

Date	Filings—Proceedings	Attorneys Pltf.	Attorneys Deft.
Feb. 21-50	Filed Complaint and Issued Summons.		
Mar. 2-50	Filed Summons & Return—Served Gerson Werner, Atty. for Lee Shubert, Jacob J. Shubert and Select Theatres Corp. on 2-21-50; Served Marcus Heiman on 2-21-50; Served Marcus Heiman, Pres. for United Booking Office, and L. A. B. Amusement Corp. on 2-21-50.		
Mar. 10-50	Filed Notice of Appearance (Deft. United Booking Office, Inc.)		K&W CS&M
Mar. 10-50	Filed Notice of Appearance (Deft. Marcus Heiman).		CS&M
Mar. 15-50	Filed Stip. & Order extending time to answer to 4-22-50, McGohey, J.		
Mar. 23-50	Filed Notice of Appearance (Deft. L. A. B. Amusement Corp.)		LS&K
Apr. 24-50	Filed Stip. & Order extending time to answer to 6-1-50, Clancy, J. (Lee Shubert, et al).		
May 31-50	Filed Answer of Defts. Lee Shubert, Jacob J. Shubert and Select Theatres Corp.		K&W.
June 1-50	Filed Answer of Deft. L. A. B. Amusement Corp.		LS&K.
June 1-50	Filed Answer of Deft. United Booking Office, Inc.		CS&M.
June 1-50	Filed Answer of Deft. Marcus Heiman.		CS&M.
76			
July 26-50	Filed Affdvt. of mailing of Notice of deposition to Klein & Weir, et al.	x	
Aug. 9-50	Filed Stip. & Order of taking deposition of Stair, McGohey, J.		
Aug. 23-50	Filed note of issue, show cause to seal deposition of E. D. Stair & hold same, etc. ret. 8-29-50.		
Aug. 23-50	Filed show cause order to seal deposition of E. D. Stair & hold same, etc. ret. 8-29-50.		
Sept. 5-50	Filed Stip. & Order continuing return date of show cause order (dated 8-23-50) to 9-26-50, Noonan, J.		
Sept. 6-50	Filed Interrog. of Lee Shubert, et al.		x
Sept. 21-50	Filed stip & order extending time to answer interrogs to 10-22-50. Ryan, J.		
Oct. 5-50	Filed Deposition of Edward Doughlas Stair from Detroit, Mich. (in vault Room 602) (mailed Notice).		
Oct. 5-50	Filed Pltf's Interrog. to defts. Lee Shubert, et al.	x	
Oct. 5-50	Filed Pltf's Interrog. to defts. Heiman, et ano.	x	
Oct. 5-50	Filed Pltf's Interrog. to defts. United Booking Office.	x	
Oct. 10-50	Memo. End. on Show Cause Order to seal deposition of Stair filed 8-23-50. Motion withdrawn as agreed upon between counsel. Goddard, J.		
Oct. 13-50	Filed Pltf's Objections to certain of defts' interrog.	x	
Oct. 16-50	Filed Stip. & Order extending time of defts. to object to interrog. to 11-10-50. etc., Bondy, J.		
Oct. 16-50	Filed Consent Order vacating stay and impounding directed in show cause order of 8-23-50 (to seal deposition of Stair). Bondy, J. Mailed Notice of Entry 10-17-50.	x	

Date	Filings—Proceedings	Attorneys	
		Pltf.	Deft.
Oct. 17–50	Filed Note of Issue, Motion for hearing on pltf's and defts' Objections to Interrog.—Ret. 12–19–50.	x	
Nov. 22–50	Filed Pltf's Answers to Defts' Interrog.	x	
Nov. 22–50	Filed Four folders containing documents in connection with pltf's answers to defts' interrog.		
Dec. 13–50	Filed Stip. & Order adjourning hearing on pltf's objections to interrog. to 1–23–51, Sugarman, J.		
Dec. 19–50	Filed Note of Issue, Motion to produce—Ret. 1–23–51.		
Jan. 17–51	Filed Stip. & Order adjourning hearing on pltf's objections to interrog. to 2–13–51, Coxe, J.		
Feb. 21–51	Filed Stip. & Order as to pltf furnishing copy of documents re: rulings of Court on pending objections of pltf. to interrog. (see order) Leibell, J. (returned to Judge Leibell as noted on Order).		
Mar. 19–51	Filed Stip. & Order extending time to answer to interrog. to 5–1–51, McGohey, J.		
77			
Apr. 27–51	Filed Affdvts. & Notice of Motion to produce and permit inspection.		K&W
Apr. 27–51	Filed Claim of privilege (re. information sought by defts. interrog.).	x	
Apr. 27–51	Filed Opinion #19,294 (see opinion) Leibell, J.		
May 1–51	Filed Stip. & Order extending time of defts. Heiman, et al to answer interrog. to 5–28–51, Weinfeld, J.		
May 31–51	Filed Stip. & Order extending time of defts. Heiman, et al to answer interrog. to 6–14–51, etc., S. H. Kaufman, J.		
May 29–51	Filed Note of Issue—Motion to reargue Defts. motion to produce—Ret. 6/8/51.		
July 5–51	Filed Memorandum Opinion #19,430 (see opinion) Leibell, J.		
July 5–51	Filed Stip. & Order re: withdrawing motions of defts. to reargue, etc. (see order) Leibell, J.		
July 5–51	Filed Order requiring pltf. to further answer deft's interrog. and to produce certain papers, Leibell, J., Mailed Notice of Entry 7–6–51.	x	
July 5–51	Filed Unsigned Order.		CS&M
July 23–51	Filed Pltf's Answers to certain interrog. for motion to produce.		
July 23–51	Filed Pltf's Further Answers to defts' Interrog.		
July 23–51	Filed Documents furnished in connection with Pltf's Further Answers to Defts. Interrog.		
Oct. 16–52	Filed Notice of Motion to strike affirmative defenses—Ret. 10–28–52.	x	
Oct. 22–52	Filed Notice of Motion to strike motion of pltf. under Rule 12F FRCP as not timely—Ret. 10–28–52.		K&W
Nov. 12–52	Filed Pltf's supple. interrog. to deft. United Booking Office.		
Nov. 12–52	Filed Pltf's supple. interrog. to deft. Lee Shubert, et al.		
Nov. 12–52	Filed Pltf's supple. interrog. to deft. Heiman, et ano.		

Date	Filings—Proceedings	Attorneys Pltf.	Attorneys Deft.
Nov. 14-52	Memo. End. on Motion filed 10-16-52: (see memo.) Sugarman, J. (See 2nd Memo. End., entered 3-26-53).		
Nov. 25-52	Filed pltf's memorandum in support of motion to strike.		
Nov. 25-52	Filed Order denying deft's motion to strike affirmative defenses, etc., Sugarman, J. Mailed Notice of Entry 11-26-52.	x	
Dec. 5-52	Filed Stip. & Order extending time to answer supple. interrog., Sugarman, J. (Lee Shubert, et al).		
Dec. 5-52	Filed Interrog. to Theatre Guild, Inc.	x	
Dec. 5-52	Filed Affdvt. of service of interrog. to Theatre Guild & Amer. Theatre.	x	
Dec. 5-52	Filed Interrog. to Amer. Theatre Soc.	x	
Dec. 5-52	Filed Copies of Interrog. to Theatre Guild & Amer. Theatre & Notice thereof.	x	
Dec. 18-52	Filed Photostated list of theatres, towns and states.		
Dec. 19-52	Filed Stip. & Order extending time to answer interrog. to 12-22-52, Weinfeld, J.		
78			
Dec. 22-52	Filed Answers of Defts. Heiman and LAB Amusement to interrog.		
Dec. 29-52	Filed Notice as to including statement as part of pretrial order.		
Jan. 6-53	Filed Answer of Defts. Lee Shubert, et al to pltf's supple. interrog.		
Jan. 19-53	Filed Answers of Deft. United Booking Office, Inc. to pltf's supple. interrog.		x
Jan. 23-53	Pre-trial before Bondy J. & Adjd pending decision on motion.		
Feb. 4-53	Filed Transcript of Record of Proceedings of Jan. 23, 1953.		
Mar. 16-53	Filed Pltf's requests for admissions.		
Mar. 16-53	Filed Stip. & Order removing action presently second on Civil Non-Jury Reserve Cal., etc., Knox, Ch. J.		
Mar. 16-53	Filed Notice of Motion for inspection—Ret. 3-19-53.	x	
Mar. 26-53	Filed Opinion #20,396 re: plft's motion to strike defenses (see opinion) Sugarman, J.		
Mar. 26-53	2nd Memo. End. on Motion filed 10-22-52: This decision amended in last paragraph by correcting motion numbers, Sugarman, J. (First memo. end. previously attached to motion filed 10-16-52).		
Apr. 2-53	Memo. End. on Motion filed 3-16-53: Motion withdrawn, I. R. Kaufman, J.		
Apr. 13-53	Filed Order granting and denying motion to strike affirmative defenses Sugarman, J., Mailed Notice of Entry 4-14-53.	x	
Apr. 15-53	Filed Copy of Order dated 4-10-53 with Notice of Entry.	x	
Apr. 15-53	Filed deft's answers to pltf's requests for admissions.		
Apr. 16-53	Filed Stip. & Order on procedure as to proof and authenticity of documents Dimock, J.		
Apr. 16-53	Filed Stip. & Order to retore action Non-Jury reserve cal., Knox, Ch. J.		

Date	Filings—Proceedings	Attorneys Pltf.	Deft
Apr. 30–53	Filed Notice to include statement in pre-trial order, as indicated.		
May 1–53	Filed Deft's answers to pltf's requests for admissions.		
May 5–53	Filed Notice of Motion to designate a judge for purpose of hearing all motions and matters preliminary to trial—Motion denied, Knox, Ch. J.	x	
June 19–53	Filed Transcript of Record of Proceedings of May 5, 1953.		
June 23–53	Pre-trial before Bondy J. & Adjd to 7/7/53.		
June 26–53	Filed Transcript of Record of Proceedings of June 23, 1953.		
June 30–53	Filed Transcript of Record of Proceedings of May 14, 1953.		
July 7–53	Pretrial before Bondy, J.—hearing held & adj. to 10–9–53.		
July 14–53	Filed affdvt. & notice of motion declaring defts. waived rights, etc.—Ret. 7–21–53.		
July 23–53	Filed consent & order withdrawing motion for an order with respect to stip. entered into 1/23/53 and made an order of this Court 4/16/53, and permitting inspection of those documents indicated—Murphy, J.		
July 27–53	Filed Transcript of Record of Proceedings of July 7, 1953.		
79			
Aug. 19–53	Filed Notice of Motion that pltf. may offer proof without amending complaint or pltf's answers to interrog. or alternatively to amend complaint Ret. 8–25–53.		
Aug. 25–53	Memo. End. on Motion filed 8–19–53: Motion denied without prejudice, Noonan, J.		
Aug. 25–53	Filed Affdvt. of John J. O'Connell.		
Aug. 25–53	Filed Affdvt. of Milton R. Weir.		
Sept. 4–53	Filed Unsigned Order.	USA	
Sept. 4–53	Filed Order denying pltf's motion to amend complaint, etc., Noonan, J. Mailed notice of entry 9–8–53.		K&
Sept. 9–53	Filed supplement & amendment to pltff's answers to interr.		
Sept. 17–53	Filed copy of letter dated 9–16–53 and signed by Klein & Weir, Cravath Swaine & Moore and Lipper Shinn & Keeley addressed to Hon. Stanley N. Barnes, Asst. Atty. Gen., Wash., D. C. re: returning copies of Supplement and Amendment to pltf's answers to interrog.		
Sept. 18–53	Filed affdvt & notice of motion to reargum motion to amend–ret. 9–29–53.		
Sept. 29–53	Memo endorsed on motion filed 9/18/53. Referred to Noonan, J., Holtzoff, J.		
Sept. 30–53	Filed opposing affidavit.		
Sept. 29–53	Filed affidavit of J. J. O'Connell.		
Oct. 8–53	Pre-trial before Bondy, J. & adjourned.		
Oct. 16–53	Filed motion papers re: to designate a judge to hear all motions. Ret. 10/22/53.		
Nov. 5–53	Memo. End. on Motion filed 9–18–53: Reargument granted; constrained to adhere to orig. ruling., etc. (see memo.) Noonan, J.		

Date	Filings—Proceedings	Attorneys Pltf.	Attorneys Deft.
Nov. 10-53	Filed Pltf's Requests for Admissions.		
Nov. 16-53	Filed Unsigned Order.		CS&M
Nov. 16-53	Filed Order granting motion for reargument and on such reargument original order filed 9-4-53 adhered to, Noonan, J. Mailed notice of entry 11-17-53.	x	
Nov. 24-53	Pre-trial before Ryan, J. Order to enter.		
Nov. 24-53	Filed Pre-trial Order, Ryan, J.		
Dec. 4-53	Filed Transcript of Record of Proceedings of Oct. 8, 1953.		
Dec. 4-53	Filed Transcript of Record of Proceedings of Nov. 5, 1953.		
Dec. 4-53	Filed Transcript of Record of Proceedings of Oct. 23, 1953.		
Dec. 4-53	Filed Stip. & Order extending time of defts. to comply with pltf's requests for Admissions to 12-11-53, Bondy, J.		
Dec. 9-53	Filed Transcript of Record of Proceeding of Nov. 24, 1953.		
Dec. 10-53	Filed Motion to dismiss (taken to Judge Knox).		CS&M
Dec. 15-53	Filed Stip. & Order extending time to comply with pltf's requests for Admission to 12-28-53, Clancy, J.		
80			
Dec. 30-53	Filed Opinion #20,872 Complaint Dismissed, Knox, Ch. J.		
Dec. 30-53	Filed Affdvt. of Milton R. Weir.		K&W
Dec. 30-53	Filed Stip. & Order extending time to comply with pltf's Requests for Admissions to 1-4-54, Dimock, J.		
Feb. 19-54	Filed Citation, (Knox, Ch. J.) Petition for Appeal, Order allowing appeal, (Knox, Ch. J.) Statement calling attention to provisions of Supreme Court Rule 12(3), Assignment of Errors and Prayer for Reversal, Statement as to Jurisdiction and Praecipe. Mailed notice of entry 2-19-54.	USA	
Feb. 19-54	Filed Proof of service of papers filed 2-19-54.	USA	
Mar. 6-54	Filed Motion to affirm (re: appeal to Supreme Court of U. S.).		
Mar. 10-54	Filed Affdvt. of service re: motion to affirm.		
Mar. 11-54	Filed Stip. & Order substituting Klein & Lund in place of Klein & Weir as attys. for defts. Jacob J. Shubert and Select Theatres Corp.		K&L
Mar. 11-54	Filed Stip. & Order substituting Klein & Lund in place of Klein & Weir, as attys. for deft. United Booking Office, Inc.		
Mar. 17-54	Filed Stip. & Order substituting annexed duplicate complaint (original filed 2-21-50) Bondy, J.		
Mar. 17-54	Certified Record on Appeal to U. S. Sup. Court.		
81-82			

LIST OF ATTORNEYS FOR DEFENDANTS

3-10-50	Cravath, Swaine & Moore	15 Broad St. (5) (6-1-50)
3-10-50	Klein & Weir	1440 Bway. (18)
5-31-50	Kelin & Weir	1440 Bway.
3-23-50	Lipper Shinn & Keeley	527 Fifth Ave. (17) (6-1-50)

83 In the United States District Court for the Southern District of New York

[Title omitted]

PETITION FOR APPEAL—February 18, 1954

The United States of America, plaintiff in the above-entitled cause, considering itself aggrieved by the final decree of this Court entered on the thirtieth day of December, 1953, does hereby pray and appeal from said final decree to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court, the plaintiff presents to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein the plaintiff considers the order erroneous are set forth in the assignment of errors and prayer for reversal accompanying this petition and to which reference is hereby made.

The plaintiff prays that its appeal may be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said final decree was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

STANLEY N. BARNES,
Assistant Attorney General.

CHARLES H. WESTON,
Special Assistant to the Attorney General.

Dated this 18th day of February, 1954.

84 In the United States District Court for the Southern District of New York

[Title omitted]

ORDER ALLOWING APPEAL—February 18, 1954

In the above-entitled cause, the United States of America, plaintiff, having made and filed its petition praying an appeal to the Supreme Court of the United States from the final decree of this Court in this cause entered on the thirtieth day of December, 1953, and having also made and filed its petition for appeal, assignment of errors and prayed for reversal, and statement of jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided,

It is therefore ordered and adjudged that the appeal be and the same is hereby allowed as prayed for.

JNO. C. KNOX,
United States District Judge.

Dated this 18th day of February, 1954.

85 STATEMENT CALLING ATTENTION TO THE PROVISIONS OF SUPREME COURT RULE 12 (3) (Omitted in printing)

86 Citation in usual form showing service on Klein, Weir, et al. Omitted in printing.

87 In the United States District Court for the Southern District of New York

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—February 18, 1954

The United States of America, plaintiff in the above-entitled cause, in connection with its petition for appeal to the Supreme Court of the United States, hereby assigns error to the record and proceedings and the entry of the final judgment of the district court on December 30, 1953, in the above-entitled cause, and says that in the entry of the final judgment the district court committed error to the prejudice of the plaintiff in the following particulars:

1. The court erred in holding that, on the facts alleged, there is no valid distinction between this case and the *Federal Baseball* case (259 U.S. 200) and the *Toolson* case (346 U.S. 356).

2. The court erred in holding that the business of producing, booking and presenting, on a multi-state basis, stage attractions performed by professional actors is not within the scope of the Sherman Act.

3. The court erred in adjudging that the complaint fails to state a claim upon which relief can be granted.

4. The court erred in entering judgment dismissing the complaint.

88 Wherefore, plaintiff prays that the final judgment of the district court may be reversed to the extent that it is inconsistent with the errors herein assigned by the plaintiff, and for such other and fit relief as to the court may seem just and proper.

STANLEY N. BARNES,
Assistant Attorney General.

CHARLES H. WESTON,
Special Assistant to the Attorney General.

Dated this 18th day of February, 1954.

89 In the United States District Court for the Southern District of New York

[Title omitted]

PRAECIPE—February 18, 1954

To: The Clerk, United States District Court, Southern District of New York.

The appellant hereby directs that, in preparing the transcript of the record in the above-entitled cause for its appeal to the Supreme Court of the United States, you include the following:

1. Complaint.
2. Answers of all defendants.
3. Defendants' motion to dismiss.
4. Opinion on motion to dismiss.
5. Order of dismissal entered December 30, 1953.
6. Copy of all docket entries.
7. Petition for Appeal.
8. Order Allowing Appeal.
9. Citation on Appeal.
10. Assignment of Errors.
11. Statement of Jurisdiction of the Supreme Court of the United States.
12. Statement of Appellant Calling Attention to Rule 12(3) of the Rules of the United States Supreme Court.

90-92 13. Proof of Service.
14. This Praecipe.

STANLEY N. BARNES,
Assistant Attorney General.

CHARLES H. WESTON,
Special Assistant to the Attorney General.

Dated this 18th day of February, 1954.

93-95 Proof of Service (omitted in printing)

96 Clerk's Certificate to foregoing transcript omitted in printing.

97 In the Supreme Court of the United States

October Term, 1953

No. 647

UNITED STATES OF AMERICA, APPELLANT

v.

LEE SHUBERT, ET AL.

STIPULATION AS TO PRINTING OF THE RECORD—Filed April 6, 1954

The parties to the above-entitled cause hereby stipulate as follows:

1. That the Clerk of this Court print the entire record in this cause as filed in this Court pursuant to appellant's praecipe to the clerk of the United States District Court for the Southern District of New York, except Items 2, 9, 11, 12, and 13 of said praecipe.

2. That any portion of the record on appeal on file with this Court which has not been printed may be referred to by any party in its brief or oral argument to the same extent that if such matter had been printed.

SIMON E. SOBELOFF,
Solicitor General.

ALFRED MCCORMACK,
Attorney for the Appellees.

April 5, 1954.

98-99 In the Supreme Court of the United States

October Term, 1953

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON—Filed April 6, 1954

Appellant adopts for its statement of points upon which it intends to rely in its appeal to this Court the points contained in its Assignment of Errors heretofore filed.

SIMON E. SOBELOFF,
Solicitor General.

April 5, 1954.

100 [File endorsement omitted.]

101-102 Supreme Court of the United States

No. 647 ——, October Term, 1953

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—April 26, 1954

Appeal from the United States District Court for the Southern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

Mr. Justice Jackson took no part in the consideration or decision of this question.

U. S. GOVERNMENT PRINTING OFFICE 1954 901729 1964

No. 36

In the Supreme Court of the United States

October Term, 1953

United States of America, Appellant,

v.

Lee Shubert, Jacob J. Shubert, Marcus Heiman, United Booking Office, Incorporated, Select Theatres Corporation, L. A. W. Amusement Corporation

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 56-72

UNITED STATES OF AMERICA, PLAINTIFF,

v.

LEE SHUBERT, JACOB J. SHUBERT, MARCUS HEIMAN, UNITED BOOKING OFFICE, INCORPORATED, SELECT THEATRES CORPORATION, L.A.B. AMUSEMENT CORPORATION, DEFENDANTS.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this cause on December 30, 1953. A petition for appeal is presented to the district court herewith, to-wit, on this 18th day of February, 1954.

OPINION BELOW

The opinion of the District Court for the Southern District of New York, which is not yet reported, reads in full as follows:

> In principle, I can see no valid distinction between the facts of this case and those which were before the Supreme Court in the cases of *Federal*

Baseball Club of Baltimore v. *National League of Professional Baseball Clubs*, 259 U. S. 200, and *Toolson* v. *New York Yankees et al.*, decided by the Supreme Court on November 9, 1953.

Upon the authority of these adjudications the complaint in the above entitled action will be dismissed.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

United States v. *Women's Sportswear Mfg. Ass'n*, 336 U. S. 460;

United States v. *New Wrinkle, Inc.*, 342 U. S. 371.

QUESTIONS PRESENTED

1. Whether the decision in *Toolson* v. *New York Yankees*, 346 U. S. 356, is controlling as to the application of the Sherman Act to the business in which the defendants are engaged—the production, booking, and presentation, on a multi-state basis, of plays and other theatrical attractions.

2. Whether this business is "trade or commerce among the several States" within the meaning of Sections 1 and 2 of the Sherman Act.

STATUTE INVOLVED

The pertinent provisions of Sections 1, 2, and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15

U. S. C. 1, 2, 4), commonly known as the Sherman Act, are as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.
>
> * * * * *
>
> Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

This is a civil action brought by the United States under Section 4 of the Sherman Act. The complaint charges (par. 50) that the defendants have been engaged for many years in a conspiracy in restraint of interstate trade and commerce in the production, booking and presentation of "legitimate attractions,"[1] and that

[1] As used in the complaint, the words "legitimate attractions" mean "stage attractions performed in person by professional actors," including plays, musicals and operettas, but not ordinarily includ-

they have conspired to monopolize, attempted to monopolize, and monopolized the booking of these attractions throughout the United States and their presentation in eleven leading cities ranging in location from Boston to Los Angeles.[2]

Following the decision of this Court in *Toolson* v. *New York Yankees*, 346 U. S. 356, the defendants filed a motion to dismiss the complaint upon the authority of that decision. The district court, following submission of briefs and oral argument, ruled that there was no valid distinction between the facts set forth in the complaint in the present case and those which were before this Court in the *Toolson* case and in *Federal Baseball Club* v. *National League*, 259 U. S. 200. The court therefore entered a judgment dismissing the complaint.

The defendants are three individuals—Lee Shubert,[3] Jacob J. Shubert, and Marcus Heiman—and three corporations controlled by them—United Booking Office, Inc. (UBO), Select Theatres Corporation (Select), and L. A. B. Amusement Corporation (L.A.B.). The prin-

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ing stock company performances, vaudeville, burlesque, dance groups, bands or concerts (par. 9).

"Presentation" means "the operation of a theatre or theatres and the exhibition of legitimate attractions therein" (par. 12).

"Booking" means the arrangements made "for the routing and presentation of legitimate attractions and the fixing of playing dates," including the making of agreements for presentation of legitimate attractions (par. 14).

"Production" is alleged to involve "(1) the assembling of the elements of a legitimate attraction, including a script, financial backing, actors, stage hands, designers, advertising agents, scenery, costumes, lighting and music; (2) rehearsals to weld the parts into a legitimate attraction suitable for presentation; (3) arranging for the booking and presentation of the attraction in a try-out town or towns; in New York City; and in road-show towns; and (4) transporting the entire cast and scenery to try-out towns, New York City and road show-towns throughout the United States to fulfill these booking and presentation arrangements" (par. 24).

[2] A copy of the complaint is attached hereto as Appendix A.

[3] Lee Shubert died prior to entry of the judgment of dismissal.

cipal business of UBO is booking, but it also finances productions (par. 5). Select, together with subsidiaries, operates approximately 19 theatres in various states, arranges booking for theatres in its chain, and produces various legitimate attractions (par. 8). L.A.B. operates three theatres and invests in the production of numerous legitimate attractions (par. 7).

The principal facts stated in the complaint, which presently must be taken as true, are as follows:

At the present time the cost of producing a play runs from $60,000 to $100,000, and of a musical from $200,000 to $300,000. Persons other than the producer usually supply the necessary financing. Frequently a play is incorporated, with shares of stock sold to investors, or the producer organizes a partnership in which investors become limited partners.

After the producer has assembled the proper cast, scenery, costumes, etc. (see par. 24, note 1, *supra*), and after rehearsals have been completed, the attraction is presented in one or more "try-out" towns [4] for the purpose of judging audience reaction and correcting any observed deficiencies (pars. 20, 26). The next step is presentation in New York City (par. 27). If the run there is successful, the producer sends the attraction on tour to "road-show" towns, that is, cities in which presentation follows a New York run (pars. 21, 27).[5]

With the exception of a few cities, a legitimate attraction ordinarily cannot profitably play in a road-show town for more than a limited period of time, sel-

[4] The key try-out towns are Boston, Philadelphia, Baltimore and New Haven, and until recently (the complaint was filed in February 1950) Washington, D. C., was also a key try-out town (par. 26).

[5] A city may be both a road-show town and a try-out town (par. 21).

dom exceeding two weeks. The producer of a play must therefore obtain playing dates in a number of suitable road-show towns, arranged so as to minimize travel between engagements. Successful operation of a theatre in a road-show town also requires scheduling legitimate attractions so as to keep the theatre as continuously occupied as possible during the theatrical season. Playing dates of a road-show town must therefore be arranged so as to meet the needs of both the producer and the theatre operator (par. 29).

UBO acts as middleman between producers and operators of theatres in try-out and road-show towns, but it is regarded as the agent of the theatre operators and it usually receives, as compensation for its services, 5% of the operator's share of the gross receipts of presentation (par. 28). Each year UBO enters into or renews arrangements with theatre operators to act as their booking agent (par. 30). After negotiations with the producer of an attraction, UBO tentatively schedules it at various road-show theatres, and contracts covering presentation at these theatres are subsequently executed (*ibid.*).

The individual defendants control the booking of legitimate attractions in try-out and road-show towns throughout the United States (par. 37). Apart from Select and a subsidiary thereof, UBO is the only concern in the country which books legitimate attractions throughout the United States (par. 5). From 1932 to 1946 UBO followed the policy of entering into franchise agreements with theatre operators making UBO exclusive booking agent for the theatres covered by the agreements (par. 40). About 1946 UBO discontinued formal franchise agreements, and it adopted in lieu thereof a system of listings which, as tacitly understood by the

parties, continued the previous contract arrangements (*ibid.*).

The defendants operate or participate in the operation of approximately 40 theatres in eight states, and they operate or control the only theatres in the key try-out towns,[6] as well as in several important road-show towns (par. 42). Approximately 50% of all the theatres in New York City are owned or operated by the Shubert defendants (pars. 15, 41).

In producing, booking, and presenting legitimate attractions, there is a constant, continuous stream of trade and commerce between the various states, consisting of assemblage of personnel and property for rehearsals, transportation of such personnel and property to various cities, making and performing contracts under which attractions are routed and presented in various states, and transmission of applications, letters, memoranda, communications, contracts, checks, drafts and other media of exchange across state lines (par. 49).

The substantial elements of defendants' conspiracy to restrain, conspiracy to monopolize, monopolization, and attempted monopolization have been that the defendants, by concert of action: (a) compel producers to book their legitimate attractions exclusively through defendants; (b) exclude others from booking legitimate attractions; (c) prevent competition in presentation of these attractions; (d) discriminate in favor of their own productions with respect to booking and presentation and (e) combine their power in booking and pres-

[6] In New Haven the only theatre is operated under a five-year agreement with a subsidiary of Select, which provides that the operator will accept only attractions booked through this subsidiary (par. 43).

entation in order to maintain and strengthen their domination in each of these fields (par. 51).

The means which the defendants have employed in carrying out the violations of the statute charged against them have included the following:

(a) Conditioning their investments in legitimate attractions produced by others, and conditioning the booking of legitimate attractions in try-out towns and in New York City, upon agreements by the producers to book these attractions exclusively through defendants;

(b) Forcing producers to book their legitimate attraction for an entire theatrical season exclusively through defendants;

(c) Coercing producers who had booked through others to pay penalties or to accept discriminatory booking terms, as a condition of obtaining bookings through them;

(d) Entering into agreements with theatre operators whereby the operators agree to present only attractions booked through defendants, and agreeing not to book for competing operators;

(e) Excluding legitimate attractions booked by others from theatres operated by defendants; and

(f) Coercing and intimidating operators of theatres located in towns where defendants operate theatres to relinquish control of their theatres by threatening to deprive them, by virtue of defendants' control of booking, of access to legitimate attractions (par. 52).

Some of the effects of defendants' concerted action have been that producers have been forced to book exclusively with defendants; persons have been denied the right to engage in the business of operating a book-

ing office; operators of theatres competing with those of defendants have been systematically prevented from obtaining legitimate attractions and, in many cities, have been forced out of business; in cities in which the defendants operate theatres the public has been deprived of access to legitimate attractions and the benefits which flow from free and open competition (par. 53).

THE QUESTIONS ARE SUBSTANTIAL

The complaint charges the defendants with using their monopolistic position in the business of booking legitimate attractions throughout the United States, and their monopolistic position in the ownership and operation of theatres located in numerous leading cities in different states, to restrain interstate production, booking and presentation of legitimate attractions. We submit that there can be no doubt that the violations of the Sherman Act so charged come within its prohibitions if these violations are governed by the usual criteria for determining the application of the statute. See *United States* v. *Southeastern Underwriters Assn.*, 322 U.S. 533; *United States* v. *Crescent Amusement Co.*, 323 U.S. 173; *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131; *United States* v. *Women's Sportswear Mfg. Assn.*, 336 U.S. 46. We understand that the district court did not think otherwise, but viewed the case as controlled by the decision of this Court in *Toolson* v. *New York Yankees*, 346 U.S. 356.

In considering whether the district court misinterpreted the scope of the *Toolson* decision, the starting point must be the basis of that decision. The Court there said it had held in 1922 in *Federal Baseball Club* v. *National League*, 259 U.S. 200, that the business of pro-

viding exhibitions of baseball games between clubs of professional baseball players is not within the scope of the Sherman Act; that Congress subsequently had not seen fit to enact legislation bringing this business under the Act; and that for thirty years the business had been left to develop "on the understanding that it was not subject to existing antitrust legislation." The Court, in these circumstances, concluded that if there are evils in this field which now warrant bringing it under the antitrust laws, "it should be by legislation," rather than by overruling its 1922 decision, "with retrospective effect." The Court therefore affirmed dismissal of the Toolson complaint "on the authority of" the *Federal Baseball* case, "[W]ithout re-examination of the underlying issues."

The opinion in the *Toolson* case makes it patent that the decision represents, and represents solely, an application of the rule of *stare decisis*. The aspects of the theatrical business here involved are within this rule only if this Court has authoritatively determined that they are governed by its decision in the *Federal Baseball* case. We submit that there has been no such authoritative determination.

We do not read the *Toolson* case as even remotely implying that the field of entertainment, which is an important part of our commercial structure, is not governed by the Sherman Act. Other cases dealing with the motion picture industry, which distributes "plays" on film, prove the contrary. In those cases restrictions permitting only certain theatres operated by a defendant to obtain pictures—restrictions exactly like those alleged here with respect to the booking of plays—have been held to violate the Sherman Act. *United States* v.

Crescent Amusement Co., 323 U.S. 173; *United States* v. *Griffith*, 334 U.S. 100; *Schine Theaters* v. *United States*, 334 U.S. 110; *United States* v. *Paramount Pictures*, 334 U.S. 131. In the motion picture cases the necessary restraint or monopoly of interstate commerce exists because the films in which the "plays" appear were sent from producers to distributors across state lines. It should certainly make no difference that the plays the interstate distribution of which is restrained are not reduced to film, or that all of the paraphernalia of a play rather than a picture of it is sent in interstate commerce. The interstate transportation of everything which goes to make a play a unit, including the performers, is no less interstate trade and no less commercial because not on a film. A play represents a welding together of plot and script, members of the cast, scenery, costumes, music and other elements, in order to make a composite whole which is distinct from its component parts and the individual actors, and which constitutes an independent product the subject of trade and barter. Cf. *Ring* v. *Spina*, 148 F. 2d 647, 650 (C.A. 2). And there is no reason why restraints of that kind of trade should be any the less subject to the Sherman Act because the play is not in film.

The movie cases also show that restraints on interstate distribution for the purpose of controlling local exhibition policies, such as admission prices and double featuring, violate the Sherman Act. *Interstate Circuit* v. *United States*, 306 U.S. 208. Such restraints are more closely concerned with local exhibition than are those alleged here.

It thus clearly cannot be said that, apart from baseball, the interstate distribution of entertainment is

exempt from the Sherman Act. Approximately a year after the *Federal Baseball* decision, this Court reversed a judgment dismissing a Sherman Act complaint which charged that the plaintiff had been injured by reason of defendants' combination to control and monopolize the booking of vaudeville acts in vaudeville theatres throughout wide areas of the country. *Hart* v. *Keith Exchange*, 262 U.S. 271. This Court, in an opinion by Mr. Justice Holmes, declared (p. 273) that the basis of the district court's ruling was that "the dominant object of all the arrangements was the personal performance of the actors, all transportation being merely incidental to that." The Court noted (*ibid.*) on the other hand that the plaintiff contended that in the transportation of vaudeville acts the apparatus—scenery, costumes, animals, etc.—"sometimes is more important than the performers." The Court held that the complaint provided factual support for this contention, and that it set forth, at least to this extent, a violation of the statute.

Certainly this decision, which holds that some restraints on the theatrical business may violate the Sherman Act, did not place the theatres in the same exempt category as baseball. It is clear, therefore, that theatrical business of the kind here involved has not been left to develop over a long period of time upon the definite understanding that it is outside the scope of the Sherman Act. There is lacking, accordingly, the rationale of the *stare decisis* rule of the *Toolson* case.

We submit that the scope of the *Toolson* decision, as raised in this appeal, clearly presents a substantial question. The question is also of manifest importance to the Government in its administration of the antitrust

laws and to private litigants. There necessarily is, at present, doubt and uncertainty respecting whether the *Toolson* decision conclusively settles, solely by reason of *stare decisis*, the application of the Sherman Act to any business other than professional baseball and, if so, to what other businesses or aspects of other businesses.[7]

We submit that the questions presented by the appeal are substantial and of public importance.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

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[7] In *United States* v. *International Boxing Club of New York, Inc.* (S.D. N.Y.), the district court recently dismissed, under authority of the *Toolson* case, a Sherman Act complaint charging illegal restraint and monopolization of interstate commerce "in the promotion, exhibition, broadcasting, telecasting, and motion picture production and distribution of professional championship boxing contests," notwithstanding factual allegations which, in the view of the Government, present issues as to the application of the Sherman Act not controlled by either th *Toolson* case or the *Federal Baseball* case.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 56-72

Filed February 21, 1950

UNITED STATES OF AMERICA, PLAINTIFF,

v.

LEE SHUBERT, JACOB J. SHUBERT, MARCUS HEIMAN, UNITED BOOKING OFFICE, INCORPORATED, SELECT THEATERS CORPORATION, L. A. B. AMUSEMENT CORPORATION, DEFENDANTS

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the defendants named herein and complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted against the defendants under Section 4 of the Act of Congress of July 2, 1890, *c.* 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, in order to prevent and restrain continuing violations by the defendants, as hereinafter alleged, of Sections 1 and 2 of the Sherman Act.

2. All the defendants inhabit, maintain their principal offices, transact business, and are found within the Southern District of New York.

II

DESCRIPTION OF DEFENDANTS

3. Lee Shubert and Jacob J. Shubert (hereinafter referred to as the Shuberts) are made defendants herein. The Shuberts are brothers and are residents of the City of New York, New York. Through the defendant Select Theatres Corporation and other corporations controlled by them, the Shuberts operate or participate in the operation of approximately 37 theatres in various States of the United States, produce and invest in numerous legitimate attractions, and own and rent rights to various attractions. The Shuberts together with the defendant Marcus Heiman are in active charge of the management, direction, and operation of the defendant United Booking Office, Incorporated. Lee Shubert is vice-president and a director of the defendant United Booking Office, Incorporated.

4. Marcus Heiman, a resident of the City of New York, New York, is made a defendant herein. Through the defendant L. A. B. Amusement Corporation and other corporations in which he has a financial interest, Marcus Heiman operates or participates in the operation of five theatres in various States of the United States and has invested in numerous legitimate attractions. Marcus Heiman together with the defendants Lee Shubert and Jacob J. Shubert is in active charge of the management, direction, and operation of the defendant United Booking Office, Incorporated. Marcus Heiman is president and a director of the defendant United Booking Office, Incorporated.

5. United Booking Office, Incorporated (hereinafter referred to as UBO) is made a defendant herein. UBO is a corporation organized and existing under the laws of the State of New York and has its principal place

of business at 234 West 44th Street, in the City of New York, New York. With the exception of the defendant Select Theatres Corporation and its subsidiary, Select Operating Corporation, UBO is the only booking office in the United States engaged in the business of booking legitimate attractions in theatres throughout the United States. It has also engaged in the financing of the production of many attractions. UBO has outstanding 500 shares of capital stock of which 250 shares are owned by the defendant Marcus Heiman and 250 shares by the defendant Select Theatres Corporation. The defendants Marcus Heiman, Lee Shubert, and Jacob J. Shubert are in active charge of the management, direction, and operation of UBO.

6. Select Theatres Corporation (hereinafter referred to as Select) is made a defendant herein. Select is a corporation organized and existing under the laws of the State of New York and has its principal place of business at 234 West 44th Street, in the City of New York, New York. It has approximately 19 subsidiary companies and 4 affiliated companies, some of which are presently inactive. Select and its subsidiaries operate approximately 19 theatres in various States of the United States. Select, directly and through subsidiary corporations, arranges bookings for several theatres in its chain, produces and invests in the production of legitimate attractions, and owns and rents rights to various attractions. The defendants Lee Shubert and Jacob J. Shubert own all the preferred stock and over 80% of the common stock of Select and are in active charge of its management, direction, and operation.

7. L. A. B. Amusement Corporation (hereinafter referred to as LAB) is made a defendant herein. LAB is a corporation organized and existing under the laws of the State of New York and has its principal place

of business at 234 West 44th Street, in the City of New York, New York. It operates three theatres in three States and has invested in the production of numerous legitimate attractions. The defendant Marcus Heiman owns all the stock of LAB and is in active charge of its management, direction, and operation.

III

Definition of Terms

8. Each of the following terms as used herein has the meaning described below:

9. *Legitimate attractions*—stage attractions performed in person by professional actors. Such attractions include plays, musicals, and operettas. The term ordinarily does not include stock company attractions, vaudeville, burlesque, bands, individual dancers, dance groups, concerts, and vocal or instrumental presentations.

10. *Theatre*—a theatre which customarily presents legitimate attractions.

11. *Producer*—any person, partnership, association or corporation engaged in the production of legitimate attractions.

12. *Presentation*—the operation of a theatre or theatres and the exhibition of legitimate attractions therein.

13. *Operator*—any person, partnership, association or corporation engaged in presentation.

14. *Booking*—the arrangement, generally made through a booking office, between producers and operators for the routing and presentation of legitimate attractions and the fixing of playing dates. The term includes entering into agreements for the presentation of legitimate attractions.

15. *Shubert-operated theatre*—a theatre which is

owned or operated by the defendants Shuberts or either of them or by any of the corporations controlled by them.

16. *Heiman-operated theatre*—a theatre which is owned or operated by the defendant Marcus Heiman or by any of the corporations controlled by him.

17. *Franchise*—a contract between an operater and the defendant UBO whereby UBO is appointed exclusive booking agent for the operator.

18. *Affiliated theatre*—a theatre which had or has a franchise with the defendant UBO or a similar working arrangement with any of the defendants herein or with any of the corporations controlled by them.

19. *Independent theatre*—a theatre which is not an affiliated theatre or in which the defendants have no financial interest.

20. *Try-out town*—a city where a legitimate attraction is presented for the purpose of judging audience reaction and eliminating observed deficiencies, prior to presentation in New York City.

21. *Road-show town*—a city where a legitimate attraction is presented after its presentation in New York City. A road-show town may also be a try-out town.

22. *Theatrical season*—the period from September of one year through May of the next.

IV

Description of the Business

23. The three branches of the legitimate theatre business herein relevant are production, booking, and presentation.

24. Production involves (1) the assembling of the elements of a legitimate attraction, including a script, financial backing, actors, stage hands, designers, advertising agents, scenery, costumes, lighting and music;

(2) rehearsing, to weld the parts into a legitimate attraction suitable for presentation; (3) arranging for the booking and presentation of the attraction in a try-out town or towns; in New York City; and in road-show towns; and (4) transporting the entire cast and scenery to try-out towns, New York City and road-show towns throughout the United States to fulfill these booking and presentation arrangements.

25. At the present time a play costs approximately $60,000 to $100,000 to produce, whereas a musical generally requires from $200,000 to $300,000. As much as one-third of the cost may be attributable to expenditures for scenery, props and related items and services. The producer usually does not invest money in his own attraction but finances it almost entirely with risk capital. The producer often incorporates the legitimate attraction as a separate venture and sells shares of stock therein to investors, or he may organize a limited partnership with the investors sharing in the venture. The producer usually begins to share in the profits only after the investors are paid back their total investments, after which the profits are generally divided 50% to the producer and 50% to the investors.

26. When rehearsals are completed, the producer arranges for the presentation of the attraction for a period of one to four weeks in a theatre in one or more try-out towns. Key try-out towns are Boston, Massachusetts; Philadelphia, Pennsylvania; Baltimore, Maryland; and New Haven, Connecticut. Until recently, when its last remaining theatre was converted into a motion-picture house, Washington, D. C. was also a key try-out town. The reaction of audiences in try-out towns is important in gauging the attraction's financial success on subsequent presentations in New York City and road-show towns.

27. If the try out is satisfactory, the attraction is

then presented in a theatre in New York City. To return any profit an attraction must generally run in a New York City theatre for a minimum of twenty weeks; to be considered a hit it must usually play to capacity or near capacity audiences in that city for a full theatrical season. If the New York City run is successful, the producer sends the attraction on tour to road-show towns throughout the United States. This road-show tour, which may be made by one or more companies, is an integral part of the exploitation of the attraction and a substantial part of its profits are so obtained.

28. The defendant UBO acts as middleman between producers and the operators of theatres in try-out and road-show towns. The booking of legitimate attractions involves the fixing of playing dates in various theatres and the cross-country routing of attractions, in a constant stream, to and from theatres in various cities throughout the United States. Although services are performed for both producers and operators, by custom and usage the defendant UBO is regarded as the agent of, and receives payment from, the operator. Generally, the producer and the operator divide the gross theatre admission receipts on a stipulated percentage basis. The defendant UBO usually receives for its services 5% of the operator's share of the gross receipts.

29. With the exception of a few cities a legitimate attraction ordinarily cannot profitably play in any one road-show town for more than a limited period of time, seldom exceeding two weeks. Therefore, successful operation of a theatre in a road-show town requires the presentation of a series of legitimate attractions so scheduled as to keep the theatre as continuously occupied as possible during the theatrical season. The producer, on the other hand, because of the fact that

he cannot keep his attraction in any one road-show town for more than a short time, must play in a number of road-show towns during the tour. For a profitable tour, the producer must obtain a series of suitable road-show playing dates so arranged as to minimize lay-offs and travel between engagements. In view of these considerations, playing dates of the producer and operator must be coordinated to permit each to meet his requirements.

30. The defendant UBO, generally before the beginning of each theatrical season, enters into or renews arrangements with operators throughout the United States to act as their agent in the booking of legitimate attractions. A producer seeking bookings consults the defendant UBO which thereupon examines its various schedules to determine the available open time at theatres suitable for the attraction. Normally, after considerable negotiation with the producer, the defendant UBO "pencils in" playing dates for the attraction and then notifies the operators accordingly. Subsequent contracts are entered into covering the presentation of the attraction at various theatres throughout the United States.

31. Booking in New York City differs from booking in try-out and road-show towns. Independent theatres in New York City are ordinarily booked through direct negotiation between producer and operator. Shubert-operated theatres in New York City are booked by an agent of the Shuberts who is also one of the two booking managers for the defendant UBO.

32. Playing dates for theatres in try-out and road-show towns are generally for a fixed period of time, after which the attraction is moved to another town. On the other hand, in New York City an attraction is booked to run indefinitely, provided it grosses a specified amount each week. This provision is known as a

"stop clause." If the attraction grosses less than the minimum in the "stop clause," either party has the option of removing the attraction from the theatre after prescribed notice has been given.

33. The operator enters into a contract with the producer to make his theatre (whether located in a try-out or a road-show town or in New York City) available to the producer for a specified legitimate attraction. Usually the operator receives his compensation in the form of a percentage, varying from 20% to 40% of the total gross theatre admission receipts. However, in many instances the operator will insist that the producer guarantee payment of a minimum sum. The operator furnishes the theatre, including light, heat, and a limited number of service personnel, and in conjunction with the producer prepares the legitimate attraction for presentation in the theatre. In addition, the operator may pay all or part of the cost to "take-in" and set up the scenery and paraphernalia, as well as furnish a limited number of stage-hands and musicians. When the engagement is concluded the operator may pay part or all of the cost of "taking-out" the scenery and paraphernalia and preparing same for shipment to the next theatre. The operator may also pay part of the cost for advertising the attraction. The producer, on the other hand, usually must bring with him and furnish all the necessary scenery, costumes, props, and special lighting effects, together with a complete cast. The producer also provides advertising material prior to the presentation of the attraction and must provide personnel in addition to those provided by the operator.

34. Operators outside of New York City are financially dependent upon a steady flow of legitimate attractions. Theatres in try-out and road-show towns supply a market for legitimate attractions which is of vital importance to the profitable presentation and exploitation

of such attractions. Moreover, theatres in road-show towns provide an opportunity for the producer of a popular attraction to have access to the widest possible market.

V

Position of the Defendants in the Business

A. Production

35. For a number of years the defendants Shuberts and corporations controlled by them engaged in both the production of their own legitimate attractions and the financing of attractions of other producers. At the present time their production activities are concentrated largely in the latter field. The defendant Heiman and corporations controlled by him likewise engage in the financing of the production of legitimate attractions.

36. The defendants, moreover, have entered into various arrangements with the Theatre Guild, Inc., one of the leading producers of legitimate attractions in the United States, which arrangements are approximately as follows: The Guild customarily presents three of its own productions and three outside productions during each theatrical season. Tickets for these attractions are sold on a subscription basis on behalf of the Guild by the American Theatre Society and such sales represent a substantial portion of the box office receipts. This Society, through a play selection committee, also selects those attractions which are to be included in the subscription season of the Guild. The public, in reliance on the Guild's selection of legitimate attractions, pays large sums of money in various cities of the United States for subscriptions therefor. The defendants Shuberts and Heiman own a substantial block of stock in the American Theatre Society, and the defendants Lee Shubert and Heiman comprise two of the four

members of its play selection committee. The defendants Shuberts and Heiman have also made substantial investments in Guild productions.

B. Booking

37. The defendants Shubert- and Heiman control the booking of legitimate attractions in try-out and road-show towns throughout the United States. Furthermore, the defendants Shuberts control the booking of approximately 50% of the theatres in New York City.

38. Prior to 1932, when the defendant UBO was organized, two booking offices, both located in New York City, were available for the booking of legitimate attractions in try-out and road-show towns. These were the Klaw-Erlanger office, controlled by the Erlanger family, and the Shubert office, controlled by the Shuberts. Each booked primarily into its own chain of theatres. In or about 1928, the defendant Heiman became a partner in the Erlanger theatre interests, including a share in the Klaw-Erlanger booking office. In 1931 the Shubert Theatre Corporation went into receivership, the defendant Lee Shubert and the Irving Trust Company being appointed receivers. In or about August 1932, the Klaw-Erlanger booking office and the Shubert booking office were merged, the resulting combination being known as the United Booking Office, Incorporated. UBO issued five hundred shares of stock; of these Lee Shubert and the Irving Trust Company, as receivers, obtained 250 shares, and Leonard Bergman, a member of the Erlanger family, obtained the other 250. On May 3, 1933, Heiman acquired 125 shares of this stock from Bergman and on March 17, 1944, the other 125 shares. Prior to this last transfer Heiman represented both his own interests and those of Bergman in UBO. In the interim, the Shuberts organ-

ized Select which purchased from the receivers the entire assets of the Shubert Theatre Corporation, including 250 shares of UBO stock. The formal transfer of UBO stock to Select occurred on June 30, 1933. Thus, the stock of UBO is now owned 50% by Heiman and 50% by the Shuberts, through Select.

39. For a number of years Heiman has been the president and one of the four directors of UBO. Lee Shubert is vice-president and director. Of the other two officers of UBO, one is an associate of the Shuberts, the other an associate of Heiman. Likewise, of the remaining two directors of UBO, one is a nominee of Heiman, the other a nominee of the Shuberts. UBO also employs two booking managers, Augustus Pitou and Elias Weinstock. Pitou was formerly connected with the Klaw-Erlanger office and is the Heiman representative in UBO. In addition to his booking duties, Pitou has over-all supervision of the Heiman-operated theatre in Boston, Massachusetts and of the Heiman-operated theatre in Pittsburgh, Pennsylvania; the latter theatre, the Nixon, was sold in 1948 by Heiman to make way for an office building and is scheduled for demolition in 1950. The other booking manager of UBO, Elias Weinstock, is the Shubert representative in UBO, having occupied that position since 1939 when his predecessor, Jules Murry, died. Weinstock spends approximately half his time booking for UBO and devotes the remainder of his time working for the Shuberts. He books legitimate attractions for several Shubert-operated theatres in try-out and road-show tours and for all the Shubert-operated theatres in New York City. He also manages the Shubert-operated Booth Theatre in New York City.

40. In 1932 the defendants adopted a policy whereby UBO entered into franchise agreements with operators

of theatres in various road-show towns throughout the United States where the defendants themselves did not operate theatres. Under each of these agreements the operator appointed UBO exclusive booking agent for the booking of legitimate attractions into the theatre and agreed to pay UBO a fee of 5% of his share of the gross receipts from all legitimate attractions presented at the theatre during the period of the franchise. The operator usually agreed not to transfer his interest in the theatre without consent of UBO and UBO in return agreed to use its best efforts to book for the theatre during the period covered by the franchise. It was also generally understood by the parties that if UBO granted a franchise to an operator in a particular town, it would not thereafter, during the period of the franchise, grant a second franchise to another operator in the same town. At the outset franchises covered periods varying from one to five years. Subsequently, UBO limited these franchises to a period of one year and usually negotiated new ones or renewals prior to each theatrical season. In or about 1946 UBO discontinued formal franchise agreements and adopted in lieu thereof a system of listings, whereby it was tacitly understood between the parties that they would continue the previous arrangements without a written contract.

C. Presentation

41. The defendants, as will hereinafter be described, are the only operators of theatres in virtually all key try-out towns and in several important road-show towns. In addition, approximately 50% of all the theatres in New York City are Shubert-operated theatres.

42. The defendants operate or participate in the

operation of approximately 40 theatres in eight States. The distribution of these theatres is as follows:

City	*No. of Theatres*
Baltimore, Md.	1
Boston, Mass.	6
Chicago, Ill.	7
Cincinnati, Ohio	1
Detroit, Mich.	2
Los Angeles, Calif.	1
New York, N. Y.	17
Philadelphia, Pa.	4
Pittsburgh, Pa.	1
Total	40

A. *Baltimore.* The only theatre in this city at the present time is Ford's Theatre, which is leased and operated by UBO. Select, through a wholly-owned subsidiary, guarantees 50% of the obligations of UBO under the lease, and the other 50% is guaranteed by LAB.

B. *Boston.* There are six theatres in this city, all of which are controlled by the defendants. Four are Shubert-operated theatres as follows: Copley, Opera House, Plymouth, Shubert. Heiman, through LAB, operates the Colonial. In addition, the Shuberts and Heiman jointly operate the Wilbur Theatre.

C. *Chicago, Illinois.* There are nine theatres in this city, all but two of which are operated by the defendants. Six are Shubert-operated theatres, as follows:

Blackstone
Great Northern
Harris
Selwyn
Shubert
Studebaker

Heiman, through LAB, operates the Erlanger Theatre.

D. *Cincinnati, Ohio.* The only theatre in this city is the Cox, which is a Shubert-operated theatre.

E. *Detroit, Michigan.* There are three theatres in this city. Of these, the Shuberts have an interest in the operation of two, namely, the Cass and the Shubert-Lafayette.

F. *Los Angeles, California.* The only theatre in this city is the Biltmore, which is a Heiman-operated theatre.

G. *New York City, New York.* There are thirty-two theatres in this city. Of these, at least fifteen are Shubert-operated theatres, as follows:

Barrymore
Booth
Broadhurst
Broadway
Century
Cort
Golden
Imperial
Majestic
National
Plymouth
Royale
St. James
Shubert
Winter Garden

The Shuberts also own one-third of the stock of the corporation which operates the Music Box Theatre, and have the exclusive booking rights for, and a one-third interest in, the Lyceum Theatre.

H. *Philadelphia, Pennsylvania.* There are four theatres in this city, all of which are Shubert-operated theatres. These theatres are the Forrest, Locust, Shubert and Walnut Street.

I. *Pittsburgh, Pennsylvania.* The only theatre in this city is the Nixon, which is a Heiman-operated theatre. The theatre was sold in 1948 to make way for an office building, and it is scheduled for demolition in 1950.

43. In New Haven, Connecticut, there is only one theatre, the Shubert, which for a number of years prior to 1941 was a Shubert-operated theatre. It became an affiliated theatre in 1941 when a new corporation took over the lease and operation of the theatre under an agreement with a subsidiary of Select, whereby the operator agreed to accept only attractions booked through said subsidiary. This agreement was renewed in 1946 for a period of five years.

44. In Washington, D. C. there is at the present time no theatre. For a number of years two theatres in this city were available for the presentation of legitimate attractions, the Belasco and the National, both controlled by the defendants. By design and agreement of the defendants the Belasco was kept "dark" for a number of years so as to eliminate competition. In 1948 the defendant Heiman converted the National into a motion-picture house, despite the fact that Washington, D. C. is acknowledged to be one of the most desirable cities in the United States for the presentation of legitimate attractions. Other persons desiring to operate a theatre in Washingon, D. C. have been unable to obtain a commitment from the defendants with respect to securing legitimate attractions, hence, making it difficult, if not impossible, for a person independent

of the defendants to operate a theatre in Washington, D. C.

45. In Toledo, Ohio, there is only one theatre, the Town Hall, which is owned by the Shuberts. In 1947, this theatre became an affiliated theatre when it was leased by the Shuberts under an agreement granting exclusive booking rights to UBO.

VI

Interstate Commerce

46. The business of producing legitimate attractions for presentation in try-out towns, New York City, and road-show towns involves the securing of actors, scenery, costumes, appropriate lighting, music and other paraphernalia, then the welding of all the parts into presentable form through rehearsals, generally in New York City. When the rehearsals are completed, the entire cast and the scenery, costumes, lighting, music, and other paraphernalia are transported across State lines to a key try-out town such as Boston, Massachusetts; Philadelphia, Pennsylvania; Baltimore, Maryland; or New Haven, Connecticut. The try-out performances are an essential part of the fashioning of a successful vehicle for presentation in New York City and in road-show towns. If the attraction is successful in the try-out town, the cast and the scenery, costumes, lighting, music and other paraphernalia are then transported to New York City for presentation. If that presentation is successful, the actors and the above-mentioned essential and costly equipment are then transported across various State lines on a road-show tour to various cities in the United States. The road-show tour of a successful legitimate attraction is an integral part of the over-all presentation.

47. As a necessary part of the fulfillment of booking

contracts, legitimate attractions must go from State to State, staging performances here and there and fulfilling their contracts as much by the interstate movement as by the acting.

48. In the usual course of producing, booking, and presenting legitimate attractions there is a continuous flow of applications, letters, memoranda, communications, money, checks, drafts and other media of exchange from operators and other persons in various States of the United States across State lines to the defendants in Ne wYork City. Likewise, there is a continuous flow of memoranda, letters, commitments, contracts, and communications from the home offices of the defendants in New York City across State lines to operators and other persons in various States of the United States.

49. In the course of producing, booking and presenting legitimate attractions, there is a constant, continuous stream of trade and commerce between the States of the United States, consisting of the assemblage of personnel and property for rehearsals, the transpor a-tion of said personnel and property to various cities throughout the United States, the making and performing of contracts under which attractions are routed and presented in various States of the United States, and the transmission of applications, letters, memoranda, communications, commitments, contracts, money, checks, drafts and other media of exchange across State lines.

VII

Offenses Charged

50. The defendants, for many years last past, have been and now are engaged in a combination and conspiracy in restraint of the aforesaid interstate trade and commerce in the production, booking and presenta-

tion of legitimate attractions, and have combined and conspired to monopolize, and have attempted to monopolize and have monopolized the aforesaid interstate trade and commerce in the booking of legitimate attractions throughout the United States and in the presentation of legitimate attractions in Baltimore, Maryland; Boston, Massachusetts; Chicago, Illinois; Cincinnati, Ohio; Detroit, Michigan; Los Angeles, California; New York City, New York; Philadelphia, Pennsylvania; Pittsburgh, Pennsylvania; and Washington, D. C., in violation of Sections 1 and 2 of the Sherman Act. The defendants threaten to continue such offenses, and will continue them, unless the relief hereinafter prayed for in this complaint is granted.

51. The aforesaid combinations and conspiracies to unreasonably restrain and to monopolize trade and commerce, the attempts to monopolize and the monopolizations of trade and commerce have consisted of a continuing concert of action among the defendants, the substantial terms of which have been that the defendants: (a) compel producers to book their legitimate attractions exclusively through the defendants; (b) exclude others from booking legitimate attractions; (c) prevent competition in the presentation of legitimate attractions; (d) discriminate in favor of their own productions with respect to booking and presentation; and (e) combine their power in booking and presentation in order to maintain and strengthen their domination in each of these fields.

52. Pursuant to said combinations and conspiracies, attempts to monopolize and monopolizations, the defendants have done the things they agreed to do, by the following means, among others:

(a) Conditioned their investments in the productions of legitimate attractions by others upon

agreements by the producers to book each of those attractions exclusively through the defendants;

(b) Booked substantially all legitimate attractions produced by the defendants;

(c) Forced producers to grant to the defendants the exclusive right to book the legitimate attractions of said producers for an entire theatrical season;

(d) Conditioned the booking of legitimate attractions into theatres in try-out towns upon agreements by the producers to book each of those attractions exclusively through the defendants thereafter;

(e) Conditioned the booking of legitimate attractions into Shubert-operated theatres in New York City upon agreements by the producers to book each of those attractions exclusively through the defendants thereafter;

(f) Coerced producers who had booked independently of the defendants to pay penalties or to accept unfavorably discriminatory booking terms, as a condition of obtaining bookings through them;

(g) Entered into agreements with operators whereby said operators agreed to present only attractions booked through the defendants and defendants agreed not to book for competing operators;

(h) Excluded legitimate attractions booked independently of the defendants from theatres operated by them and from affiliated theatres;

(i) Excluded legitimate attractions booked through the defendants from theatres competing with affiliated theatres or with those operated by the defendants;

(j) Harassed operators of competing theatres;

(k) Coerced and intimidated independent thea-

tre operators located in towns where the defendants operated theatres, or where they desired to operate theatres, to relinquish control of their theatres or a share of the profits thereof, by expressed or implied threats to deprive them, by virtue of the defendants' control of booking, of access to legitimate attractions;

(l) Acquired control of the operation of competing theatres.

VIII

Effects

53. The concerted action of the defendants pursuant to and in furtherance of the violations of law alleged in this complaint have had, among others, the following effects:

(a) Producers have been forced to book exclusively with the defendants, on non-competitive terms, in order to obtain access to suitable theatres;

(b) Persons have been denied the right to engage in the business of operating a booking office in competition with the defendants;

(c) Operators of independent theatres in cities where the defendants operate theatres, or where affiliated theatres are located, have been systematically excluded from obtaining legitimate attractions;

(d) In many cities where the defendants operate theatres, or where affiliated theatres are located, operators of independent theatres have been forced out of the business of presenting legitimate attractions;

(e) Persons have been denied the right to engage in the business of presenting legitimate attrac-

tions in cities where the defendants operate theatres, or where affiliated theatres are located;

(f) In cities where the defendants operate theatres, or where affiliated theatres are located, the public has been deprived access to legitimate attractions and the benefits which flow from free enterprise and open competition;

(g) The interstate commerce in production, booking, and presentation has been unreasonably restrained and the interstate commerce in booking and presentation has been monopolized.

Prayer

Wherefore, plaintiff prays:

(1) That the Court adjudge and decree that the defendants, and each of them, have combined and conspired to unreasonably restrain and to monopolize trade and commerce, have attempted to monopolize and have monopolized trade and commerce, as hereinbefore alleged, in violation of Sections 1 and 2 of the Sherman Act.

(2) That the defendants herein, their subsidiaries, and each of them, and each and all of their respective officers and directors, and each and all of their respective agents, servants and employees, and all persons acting or claiming to act on behalf of the defendants, their subsidiaries, or any of them, be perpetually enjoined and restrained from continuing to carry out, directly or indirectly, expressly or impliedly, the combinations and conspiracies to unreasonably restrain and to monopolize trade and commerce, the attempts to monopolize and the monopolizations of trade and commerce, as hereinbefore alleged, in the production, booking and presentation of legitimate attractions, and any similar conspiracies, attempts to monopolize, or monopolizations.

(3) That the Court adjudge and decree that the integration by the defendants of the production, booking and presentation branches of the legitimate theatre business has been used unlawfully as an instrumentality of monopoly and restraint upon interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Act.

(4) That the Court adjudge and decree that the defendants have used their interest in and control of presentation and booking to restrain trade and commerce in the production of legitimate attractions in violation of Section 1 of the Sherman Act.

(5) That the Court adjudge and decree that the defendants have used their interest in and control of presentation and their interest in production to restrain and to monopolize trade and commerce in the booking of legitimate attractions in violation of Sections 1 and 2 of the Sherman Act.

(6) That the Court adjudge and decree that the defendants have used their interest in and control of presentation and booking and their interest in production to restrain and to monopolize trade and commerce in the presentation of legitimate attractions in violation of Sections 1 and 2 of the Sherman Act.

(7) That the Court

(a) order and direct the defendants to divest themselves of all interest in either the booking branch or the presentation branch of the business, under terms and conditions which will assure that no divested interest or no retained interest will be used in restraint of trade, and retain jurisdiction for the effectuation of its order;

(b) perpetually enjoin and restrain each of the defendants from acquiring any interest in that branch of the business so relinquished; and

(c) order and direct the defendants, and each of them, (in the event that the Court permits the

defendants, or any of them, to engage in presentation) to divest themselves of all interest and ownership in such theatres as may be necessary to dissipate the effects of the unlawful activities hereinbefore alleged, and to restore competition in such trade and commerce; and that the Court perpetually enjoin and restrain said defendants from acquiring any interest in any theatre except upon a showing to the Court that such acquisition will not unreasonably restrain the trade and commerce in the presentation of legitimate attractions in any section or community, or tend to create a monopoly in that line of commerce.

(8) That the plaintiff have such other relief as the Court may deem appropriate in order to prevent restraints of trade and commerce, attempts to monopolize and monopolizations in any branch of the business in which defendants may hereafter be engaged.

(9) That the plaintiff recover its costs herein.

Dated:

(S.) J. Howard McGrath,
Attorney General.

(S.) Herbert A. Bergson,
Assistant Attorney General.

(S.) Irving H. Saypol,
United States Attorney.

(S.) Melville C. Williams,
Chief, New York Office.

(S.) Richard K. Decker,
(S.) Herbert N. Maletz,
(S.) Harold Lasser,
(S.) Henry M. Stuckey,
(S.) Victor A. Altman,
(S.) Estella L. Baldwin,
Attorneys for the United States.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 56-72

UNITED STATES OF AMERICA, PLAINTIFF,

against

LEE SHUBERT, JACOB J. SHUBERT, MARCUS HEIMAN, UNITED BOOKING OFFICE, INCORPORATED, SELECT THEATRES CORPORATION, L. A. B. AMUSEMENT CORPORATION, DEFENDANTS

(Filed Dec. 30, 1953, 3:00 P. M., U. S. District Court, S. D. of N. Y.)

OPINION

Philip Marcus, Esq., Special Assistant to the Attorney General, Attorney for Plaintiff.

Klein & Weir, Esqs., Attorneys for defendants, Lee Shubert, Jacob J. Shubert and Select Theatres Corporation.

Cravath, Swaine & Moore, Esqs., Attorneys for defendants, Marcus Heiman and United Booking Office, Inc.

Lipper, Shinn & Keeley, Esqs., Attorneys for defendant, L. A. B. Amusement Corporation.

KNOX, C. J. December 1953.

KNOX, C. J.

In principle, I can see no valid distinction between the facts of this case and those which were before the Supreme Court in the cases of *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U. S. 200, and *Toolson* v. *New York*

Yankees, et al, decided by the Supreme Court on November 9, 1953.

Upon the authority of these adjudications the complaint in the above entitled action will be dismissed.

December 30, 1953.

JNO. C. KNOX,
Chief Judge.

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No. 36

In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, APPELLANT

v.

LEE SHUBERT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

SIMON E. SOBELOFF,
Solicitor General,
STANLEY N. BARNES,
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Washington 25, D. C.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 18) is reported at 120 F. Supp. 15.

JURISDICTION

The judgment of the district court was entered on December 30, 1953 (R. 18). The petition for appeal was presented and allowed on February 18, 1954 (R. 24-25), and probable jurisdiction was noted on April 26, 1954 (R. 28). The jurisdiction of this Court is conferred by section 2 of the Ex-

pediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by section 17 of the Act of June 25, 1948, 62 Stat. 869.

QUESTIONS PRESENTED

1. Whether, as a result of this Court's decisions in the baseball cases (*Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U. S. 200, and *Toolson* v. *New York Yankees*, 346 U. S. 356), the doctrine of *stare decisis* requires a holding that the theatrical business is excluded from the scope of the federal antitrust laws.

2. If not, whether the allegations of the complaint are sufficient to establish that appellees' business—*i. e.*, production, booking, and presentation, on a multi-state basis, of plays and other theatrical attractions—is "trade or commerce among the several States" within the meaning of sections 1 and 2 of the Sherman Act.

STATUTE INVOLVED

The pertinent provisions of sections 1, 2, and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. 1, 2, 4), commonly known as the Sherman Act, are as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to

be illegal shall be deemed guilty of a misdemeanor, * * *.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

* * * * *

Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

This is a civil action brought in February 1950 by the United States under section 4 of the Sherman Act (R. 1). The complaint charges (par. 50, R. 12) that the appellees have been engaged for many years in a conspiracy in restraint of interstate trade and commerce in the production, booking, and presentation of "legitimate" theatrical attractions,[1] and that they have conspired to monopolize,

[1] "Legitimate attractions" is used in the complaint to mean "stage attractions performed in person by professional actors," including plays, musicals, and operettas, but ordinarily not including stock-company attractions, vaudeville, burlesque, dance groups, bands, or concerts (par. 9, R. 3).

attempted to monopolize, and monopolized the booking[2] of these attractions throughout the United States and their presentation in ten leading cities,[3] in violation of sections 1 and 2 of the Act.

The appellees are three individuals—Lee Shubert,[4] his brother Jacob J. Shubert, and Marcus Heiman——and three corporations controlled by them—United Booking Office, Inc. ("UBO"), Select Theatres Corporation ("Select"), and L.A.B. Amusement Corporation ("L.A.B.") (R. 1-3). The principal business of UBO is the booking of legitimate attractions, but it also finances productions (R. 2). Select, together with subsidiaries, operates approximately nineteen theatres in various states, arranges booking for theatres in its chain, and produces various legitimate attractions (R. 2-3). L.A.B. operates three theatres and invests in numerous legitimate attractions (R. 3).

Following the decision of this Court in *Toolson* v. *New York Yankees*, 346 U. S. 356, the appellees, upon the authority of that decision, moved to dismiss the complaint (R. 17). The district court (Knox, C. J.), after submission of briefs and oral argument, granted the motion, and entered judg-

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[2] "Booking" is defined in the complaint to mean the arrangements, generally made through a booking office, between producers and theatre operators for the routing and presentation of legitimate attractions (par. 14, R. 3).

[3] The cities are: Baltimore, Md.; Boston, Mass.; Chicago, Ill.; Cincinnati, Ohio; Detroit, Mich.; Los Angeles, Calif.; New York City, N. Y.; Philadelphia, Pa.; Pittsburgh, Pa.; and Washington, D. C. (par. 50, R. 12).

[4] Lee Shubert died prior to entry of judgment by the court below.

ment of dismissal. The court rendered the following opinion (R. 18):

> In principle, I can see no valid distinction between the facts of this case and those which were before the Supreme Court in the cases of *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U. S. 200, and *Toolson* v. *New York Yankees, et al.*, decided by the Supreme Court on November 9, 1953.
>
> Upon the authority of these adjudications the complaint in the above entitled action will be dismissed.

The principal facts stated in the complaint—admitted for purposes of the motion to dismiss—are as follows:

Production of a legitimate theatrical attraction involves (1) assembling of its component elements, including a script, financial backing, actors, stage hands, designers, advertising agents, scenery, costumes, lighting, and music; (2) rehearsals to weld the parts into an attraction suitable for presentation; (3) arranging for the booking and presentation of the attraction in a try-out town or towns, in New York City, and in road-show towns; and (4) transporting the entire cast and scenery to try-out towns, to New York City, and to road-show towns throughout the United States to fulfill these bookings and presentation arrangements (par. 24, R. 4). At the present time the cost of producing a play runs from $60,000 to $100,000, and of a musi-

cal from $200,000 to $300,000 (par. 25, R. 4). Persons other than the producer usually supply the necessary financing (*ibid.*). Frequently the production is incorporated and shares of stock are sold to investors, or the producer organizes a limited partnership (*ibid.*). All the appellees invest in legitimate attractions (pars. 3-7, R. 1-3).

After the production has been assembled and rehearsals have been completed, the attraction is presented in one or more "try-out" towns for the purpose of judging audience reaction and correcting observed deficiencies (pars. 20, 26, R. 4, 5). Audience reaction in try-out towns is important in gauging subsequent financial success in New York City and on the road (par. 26, R. 5). The attraction is then presented in New York City (par. 27, R. 5). If the run there is successful, the attraction is sent on tour to "road-show" towns throughout the United States (*ibid.*). This road-show tour is an "integral part of the exploitation of the attraction" and is the source of a "substantial part" of its profits (*ibid.*).

With the exception of a few cities, a legitimate attraction ordinarily cannot profitably play in a road-show town for more than a limited period of time, seldom exceeding two weeks. The producer of a play must therefore obtain playing dates in a number of suitable road-show towns, arranged so as to minimize lay-offs and travel between engagements. Successful operation of a theatre in a road-show town requires scheduling legitimate attractions so as to keep the theatre as continuously occu-

pied as possible during the theatrical season. Playing dates of a road-show town must therefore be arranged so as to meet the needs of both the producer and the theatre operator. (Par. 29, R. 5.)

UBO acts as middleman between producers and operators of theatres in try-out and road-show towns, but is regarded as the agent of the theatre operators and usually receives, as compensation for its services, five per cent of the operator's share of the theatre's gross receipts (par. 28, R. 5). Each year UBO enters into or renews agreements with theatre operators to act as their booking agent (par. 30, R. 5). After negotiation with the producer of an attraction, UBO tentatively schedules it at various theatres throughout the United States, and contracts covering presentation at these theatres are subsequently executed (*id.*, R. 5-6). The booking of legitimate attractions involves the cross-country routing of attractions in a constant stream to and from theatres in various cities throughout the United States (par. 28, R. 5).

The individual appellees control the booking of legitimate attractions in try-out and road-show towns in the United States (par. 37, R. 7). Apart from Select and a subsidiary thereof, UBO is the only concern in the country which books legitimate attractions throughout the United States (par. 5, R. 2). From 1932 to 1946, UBO followed a policy of entering into franchise agreements with theatre operators making UBO the exclusive booking agent for their theatres (par. 40, R. 8-9). About 1946, UBO discontinued formal franchise agreements

and adopted in lieu thereof a system of listings which, as tacitly understood by the parties, continued the previous contract arrangements (*id.*, R. 9).

The appellees operate or participate in the operation of approximately forty theatres in eight states (par. 42, R. 9). They operate or control all the theatres in "virtually all" key try-out towns, and in several important road-show towns (par. 41, R. 9).[5] Approximately fifty per cent of all the theatres in New York City are owned or operated by the Shubert appellees (pars. 15, 41, R. 3, 9).

In producing, booking, and presenting legitimate attractions, there is a constant, continuous stream of trade and commerce between the various states, consisting of assemblage of personnel and property for rehearsals, transportation of such personnel and property to various cities, making and performing contracts under which attractions are routed and presented in various states, and transmission of applications, letters, memoranda, communications, contracts, money, checks, drafts,

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[5] The appellees control or operate the only theatre in Baltimore, the six theatres in Boston, seven of the nine theatres in Chicago, the only theatre in Cincinnati, the only theatre in Los Angeles, and the four theatres in Philadelphia (par. 42, R. 9-10). They have an interest in two of the three theatres in Detroit (par. 42 E, R. 10). The only theatre in New Haven is operated under a five-year agreement with a subsidiary of Select, which provides that the operator will accept only attractions booked through this subsidiary (par. 43, R. 11). UBO has exclusive booking rights for the only theatre in Toledo, Ohio (par. 45, R. 11).

The "key" try-out towns are Boston, Philadelphia, Baltimore, and New Haven (par. 26, R. 4).

and other media of exhange across state lines (par. 49, R. 12).

The substantial elements of appellees' conspiracy to restrain and monopolize, attempted monopolization, and monopolization have been that the appellees, by concert of action: (a) compel producers to book their legitimate attractions exclusively through appellees, (b) exclude others from booking legitimate attractions; (c) prevent competition in presentation of these attractions; (d) discriminate in favor of their own productions with respect to booking and presentation; and (e) combine their power in booking and presentation in order to maintain and strengthen their domination in each of these fields (par. 51, R. 13).

The means which the appellees have used in carrying out the foregoing acts have included the following:

> Conditioning their investments in legitimate attractions produced by others, and conditioning the booking of legitimate attractions in try-out towns and in New York City, upon agreement by the producers to book these attractions exclusively through appellees (pars. 52(a), (d), (e), R. 13).
>
> Forcing producers to book their legitimate attractions for an entire theatrical season exclusively through appellees (par. 52(c), R. 13).
>
> Coercing producers who had booked through others to pay penalties or to accept discrimina-

tory booking terms, as a condition of obtaining booking through them (par. 52(f), R. 13).

Entering into agreements with theatre operators whereby the operators agree to present only attractions booked through appellees, and appellees agree not to book for competing theatre operators (par. 52(g), R. 13).

Excluding legitimate attractions booked by others from theatres operated by appellees (par. 52(h), R. 13).

Coercing and intimidating independent theatre operators in towns where appellees operate theatres to relinquish control of their theatres by threatening to deprive them, by virtue of appellees' control of booking, of access to legitimate attractions (par. 52(k), R. 14).

Some of the effects of appellees' concerted actions have been that producers have been forced to book exclusively with appellees on non-competitive terms; persons have been denied the right to engage in the business of operating a booking office; operators of independent theatres competing with those of appellees have been systematically excluded from obtaining legitimate attractions and, in many cities, have been forced out of business; in cities in which the appellees operate theatres, persons have been denied the right to engage in the business of presenting legitimate attractions, and the public has been deprived of access to legitimate attractions and the benefits which flow from open competition; and interstate commerce in production, booking,

and presentation has been unreasonably restrained, and in booking and presentation has been monopolized (par. 53, R. 14).

SUMMARY OF ARGUMENT

I

In *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U. S. 200, this Court held in 1922 that the business of professional baseball was not interstate commerce within the Sherman Act. Last term this Court refused to re-examine that decision. *Toolson* v. *New York Yankees*, 346 U. S. 356. The *Toolson* decision was based on a combination of three factors—the prior decision that baseball was not subject to the Act, baseball's reliance on that holding, and the failure of Congress, which had considered the decision, to bring the business under the Act.

None of these factors, however, is present in the case of the theatrical business. (1) This Court has never held that the theatrical business is exempt from the Sherman Act. On the contrary, *Hart* v. *B. F. Keith Vaudeville Exchange*, 262 U. S. 271, decided approximately one year after *Federal Baseball*, established that the theatrical business, in its interstate aspects, is subject to the Act. (2) In 1951 a Congressional committee conducted extensive hearings into the question of whether organized baseball should be exempted from the antitrust laws, and issued a lengthy report recommending against exemption. There has been no com-

parable Congressional consideration of exempting the theatrical business from the Act. (3) Organized baseball, in its development since 1922, could and did rely on the flat holding in *Federal Baseball* that it was not subject to the Sherman Act. The theatrical business, on the other hand, was put on notice in 1923 by the *Hart* case, *supra*, that restraints in the theatrical field similar to those charged in the instant case might contravene the Act.

The *Toolson* case did not reaffirm any broad principle of law that the business of giving local performances for the entertainment of the public is not interstate commerce. The decision represents solely an exceptional application of the doctrine of *stare decisis* based on the unique situation of, and limited to, the baseball business. Its implications do not extend to other businesses which may somewhat resemble baseball in that they, too, involve personal performances or exhibitions for public entertainment. The Court in *Toolson* expressly stated that it was not re-examining the "underlying issues" in *Federal Baseball*, and it reaffirmed *Federal Baseball* only "so far as that decision determines that Congress had no intention of including the *business of baseball* within the scope of the federal antitrust laws." 346 U. S. 357 (emphasis added).

II

If, as has been shown in Point I, the matter is not foreclosed by the *Toolson* decision, we submit that the complaint charges restraints upon, and at-

tempted and actual monopolization of, "trade or commerce among the several States" within the meaning of the Sherman Act, and therefore should not have been dismissed.

A. The business of producing, booking, and presenting legitimate stage attractions, as conducted by appellees, involves numerous commercial activities, and it constitutes trade in the "broad sense" in which that word is used in the Sherman Act. *United States* v. *National Association of Real Estate Boards*, 339 U. S. 485, 491. Appellees' activities do not cease to be trade because the final product of their endeavors—the performance of a play—involves primarily the application of artistic talents. In many businesses the final product is within the category of the arts, and the theatrical business is trade or commerce just as much as motion pictures, radio, television, or the other forms of entertainment which have been held to be within the Sherman Act.

B. In the course of appellees' business, personnel and property are assembled and are transported from state to state, contracts are made and performed under which theatrical attractions are routed to and presented in various states, and there is a "continuous flow" of communications, papers, and media of exchange across state lines. Such business plainly is carried on "among the several States." *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *United States* v. *Paramount Pictures*, 334 U. S. 131.

In the motion-picture cases just referred to, restrictions which permitted only theatres operated by the defendants to obtain films were held to violate the Sherman Act because they restrained the interstate flow of the films, and it was immaterial that the actual showing of the films "is of course a local affair." *Crescent Amusement Co.* case, *supra*, p. 183. In the instant case, appellees are alleged to have restrained interstate commerce in theatrical attractions by using their monopoly power over legitimate theatres to force producers to book exclusively with them, and it is similarly immaterial that the presentation of the play is "a local affair." A theatrical production, like a motion-picture film, represents a welding together of numerous elements, and it is an independent product which, like the film, is the subject of trade or barter.

To whatever extent the *Federal Baseball* case may reflect the view that the Sherman Act is inapplicable to interstate businesses where the subject of commerce involves an exhibition or personal effort, that view has been undermined in subsequent cases. In any event, the Sherman Act of 1890 cannot be construed to cover only the area of "commerce" defined by this Court in 1922.

ARGUMENT

The complaint charges appellees with using their monopolistic position in the business of booking theatrical attractions throughout the United States, and their monopolistic position in the ownership

and operation of theatres located in numerous cities in different states, to restrain interstate production, booking, and presentation of theatrical attractions. Appellees do not deny that, if their business is subject to the Sherman Act, the complaint sufficiently alleges substantive violations of that Act. The sole issue here is whether appellees' business is excluded from the scope of the federal antitrust laws. The district court, in holding that it is so excluded (R. 18), stated that the facts of this case are indistinguishable from those which were before this Court in the baseball cases (*Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U. S. 200; and *Toolson* v. *New York Yankees*, 346 U. S. 356), and that, accordingly, on the authority of those decisions the complaint should be dismissed.

Appellees contend that "it has now been established, by application of the doctrine of *stare decisis* in the *Toolson* case, that as a matter of law the giving of local performances for the entertainment of the public, from time to time at places in different States, is not interstate trade or commerce within the meaning of those words in the Sherman Act." (Motion to Affirm, p. 5.) We shall show, however, under Point I, that this contention is based on a misconception of the holding in the *Toolson* case; that the doctrine of *stare decisis* as applied in the baseball cases does not compel a holding that the theatrical business is, in its interstate aspects, exempt from the federal antitrust laws;

and that the considerations found by the Court to justify application of the rule of *stare decisis* to baseball in the *Toolson* case are wholly absent in this case. We shall further show, in Point II, that under the applicable decisions of this Court the business of producing, booking, and presenting theatrical attractions on a multi-state basis, conducted in the manner alleged in the complaint, is clearly "trade or commerce among the several States" within the meaning of the Sherman Act.

I

This Court's Decisions in the Baseball Cases Do Not Require, Under the Doctrine of *Stare Decisis*, a Holding That the Theatrical Business Is Excluded from the Scope of the Federal Antitrust Laws.

In 1922, this Court held in *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U. S. 200, that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws. Last term—more than 30 years later—this Court was asked to overrule that decision.[6] It declined to do so. *Toolson* v. *New York Yankees*, 346 U. S. 356. The *per curiam* opinion in the *Toolson* case leaves

[6] Considerable doubt arose in the intervening years whether, in the light of more recent decisions by this Court on the scope of the commerce power, the *Federal Baseball* case was still valid. *E.g.*, Notes, 53 Columbia Law Rev. 242, 248, 62 Yale Law J. 576, 608-612. In 1949, in *Gardella* v. *Chandler*, 172 F. 2d 402 (C.A. 2), the court distinguished the *Federal Baseball* case on the ground that the sale of radio and television broadcasting rights had sufficiently changed the interstate character of the business so as to subject it to the Sherman Act.

no doubt that the decision represents, and represents solely, an exceptional application of the doctrine of *stare decisis*, and that its implications do not extend beyond the applicability of the Sherman Act to the baseball business. The case is *sui generis*. The Court's one-paragraph opinion expressly relied upon a combination of three principal factors, peculiar to the situation of baseball, which justified the decision. None of these factors is present here.

(1) *Prior decision by this Court as to the specific business involved.* In the *Toolson* case the Court noted that it had held in 1922, in the *Federal Baseball* case, that the business of baseball was outside the scope of the federal antitrust laws. In the *Federal Baseball* case the Court held that even though professional baseball had interstate aspects (*e.g.*, transportation of personnel and equipment across state lines), the "essential thing" was "the exhibition", the "personal effort" of the players, which "would not be called trade or commerce in the commonly accepted use of these words" and hence the business was not "commerce among the States" within the Sherman Act. (259 U. S. at 208-209.) As to the theatrical business, however, the Court has never held that it is similarly exempt from the antitrust laws. On the contrary, at least since this Court's decision in 1923 in *Hart* v. *B. F. Keith Vaudeville Exchange*, 262 U. S. 271, it has been established, as is more fully shown below, that the theatrical business, in its interstate aspects, is subject to the federal antitrust laws.

(2) *Subsequent Congressional consideration.* In

Toolson the Court pointed out that "Congress has had the [*Federal Baseball*] ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect." (346 U. S. at 357).[7] In 1951, a House subcommittee, following the introduction of several bills to exempt professional sports from the antitrust laws, conducted extensive hearings into "whether or not organized baseball should be exempted from the operation of the antitrust laws." (Hearings before the House Subcommittee on Study of Monopoly Power of the Committee on the Judiciary on Organized Baseball, 82d Cong., 1st Sess., p. 1.) The Committee issued a lengthy report in which it carefully considered the problem and recommended that no legislation should be enacted. H. Rep. No. 2002, 82d Cong., 2d Sess., p. 232.

The theatrical business, on the other hand, can point to no comparable Congressional consideration of the question whether it should be exempted from the Act. Since, unlike baseball, the theatrical business had never been held by this Court to be outside the scope of the federal antitrust laws, there was no occasion for Congress to consider whether that business should be "brought" under these laws. The only question which might have been

[7] The mere failure of Congress to amend a statute after it has been considered by this Court does not ordinarily give rise to any inference of legislative ratification of the judicial construction. There must be persuasive evidence of specific legislative history reflecting clear and unequivocal affirmation of the decision. *Girouard* v. *United States*, 328 U.S. 61, 69; *Helvering* v. *Hallock*, 309 U.S. 106, 119.

submitted to Congress was whether the laws should be amended to grant an exemption to the theatrical business. It does not appear that any such proposals, if made, have ever received serious consideration in Congress.

(3) *Reliance on this Court's prior decision.* In the *Toolson* case the Court stated that, as a result of its decision in the *Federal Baseball* case and the subsequent failure of Congress to enact legislation bringing baseball under the federal antitrust laws, the baseball business "has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation." (346 U. S. at 357). The theatrical business, on the other hand, did not and could not rely on any authoritative judicial or legislative determination that it was exempt from the federal antitrust laws; and it has not, and could not have, been left to develop over the years upon an understanding that it was exempt from antitrust regulation.

Professional baseball, in its development since 1922, could and did rely on the flat holding in the *Federal Baseball* case that it was not subject to the antitrust laws.[8] The theatrical business, however,

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[8] Since 1922, professional baseball has developed, at great expense, the extensive minor league "farm system." H. Rep. No. 2002, 82nd Cong., 2d Sess., pp. 62-74, 177-189. The existence of this system "is inextricably tied" to the "reserve clause" in players' contracts (*id.*, p. 185). The alleged illegality of this clause was the gravamen of the complaint in the *Federal Baseball* case. See *National League of Professional Baseball Clubs* v. *Federal Baseball Club of Baltimore*, 269 Fed. 681, 683 (C.A. D.C.).

had been put on notice by this Court's decision in *Hart* v. *B. F. Keith Vaudeville Exchange*, 262 U. S. 271, that restraints in the theatrical field similar to those charged in the instant case might well contravene the Sherman Act. The *Hart* case, which was decided approximately one year after the *Federal Baseball* case, was a private treble-damage action based on the defendants' alleged combination to control the booking and presentation of vaudeville acts in theatres throughout the country. The complaint alleged that the defendants' business included the making of contracts pursuant to which there was a "constant stream" of interstate commerce involving performers and their accompanying scenery, music, costumes, and animals (262 U. S. at 272-273). The district court, on the authority of the *Federal Baseball* case, dismissed the complaint for want of jurisdiction.

This Court, in an opinion by Mr. Justice Holmes (who also had written the opinion in the *Federal Baseball* case), unanimously reversed.[9] The Court stated (p. 273) that the basis of the district court's ruling was that "the dominant object of all the arrangements was the personal performance of the actors, all transportation being merely incidental

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[9] The result was perhaps foreshadowed by Judge Learned Hand's decision in *Marcinelli* v. *United Booking Offices*, 227 Fed. 165 (S.D. N.Y., 1914). That was a private antitrust suit charging that the defendants, pursuant to a conspiracy to monopolize the booking of vaudeville acts throughout the country, had driven the plaintiff, who also was engaged in booking vaudeville, out of business. Judge Hand held that the complaint alleged a conspiracy in restraint of interstate commerce.

to that." It noted (*ibid.*) on the other hand that plaintiff contended that in the transportation of vaudeville acts the apparatus "sometimes is more important than the performers." The Court concluded (p. 274) that the complaint, at least to that extent, sufficiently alleged a violation of the Act to permit the plaintiff to go to trial, since "what in general is incidental, in some instances may rise to a magnitude that requires it to be considered independently."

Appellees argue (Motion to Affirm, pp. 8-11) that the subsequent history of the *Hart* litigation vitiates its value as a precedent. They state (*ibid.*) that at the subsequent trial the complaint was dismissed at the close of the plaintiff's case for failure to prove that the interstate aspects of the business were more than "incidental," that the Court of Appeals affirmed, *Hart* v. *B. F. Keith Vaudeville Exchange*, 12 F. 2d 341 (C.A. 2), and that this Court denied certiorari, 273 U. S. 703. They contend (*id.*, pp. 11, 14) that the "necessary effect" of such denial of certiorari was to allow the theatrical business to remain outside the scope of the Sherman Act, at least in the circuit in which its major activities are conducted, and that as a result of the *Hart* litigation and the later case of *Conley* v. *San Carlo Opera Co.*, 163 F. 2d 310 (C.A. 2) (discussed *infra*, p. 30), the theatrical business also "has been allowed to develop over a long period of years upon the premise that the Sherman Act did not apply to it."

We submit, however, that in determining

whether this Court should invoke the doctrine of *stare decisis* to preclude re-examination of one of its precedents, the pertinent inquiry is whether the industry has relied on the decision thus sought to be insulated from reconsideration, not whether it has relied upon a decision of some other court. The rationale of *stare decisis* is that sometimes it is more important that a question be determined with finality than that it be determined correctly. In such circumstances, therefore, a court may consider itself bound by its prior decision, regardless of its present view of the merits.

As appellees concede (Motion to Affirm, p. 11), the denial of certiorari in the second appeal of the *Hart* case did not constitute a holding by this Court that the theatrical business was not subject to the Sherman Act. Indeed, this Court had held the contrary in the prior appeal in the very case (see *supra*, pp. 20-21). Although the Court has applied the principle of *stare decisis* many times, we know of no instance when it has considered itself bound by a decision of a court of appeals which it had declined to review. Indeed, appellees' theory that reliance on such a lower court decision is sufficient to justify this Court in refusing to consider the same question at a later time would, in many cases, make the denial of certiorari equivalent to an affirmance of the decision which the Court refused to review.[10]

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[10] Appellees also cite (Motion to Affirm, pp. 7-8) a letter of the then Assistant to the Attorney General, dated April 2, 1920, to the Chairman of the Federal Trade Commission in

In sum, therefore, none of the unique combination of considerations which led this Court in *Toolson* to decline to reexamine its earlier holding in the *Federal Baseball* case as to baseball is present here. There is no justification for a like holding that the doctrine of *stare decisis* requires a decision, without examination of the underlying issues, that the theatrical business is exempt from the federal antitrust laws. The holding of the *Toolson* case is limited to the narrow issue there decided—the applicability of the Sherman Act to professional baseball—and it did not determine the applicability of the Act to any other business. We cannot read the *Toolson* case as even remotely implying that the theatrical business, which is an important part of our commercial structure, is in its interstate aspects exempt from the Sherman Act.

Appellees contend, however, that the Court in the *Toolson* case not only affirmed the result of the *Federal Baseball* case, but also affirmed the "principle of law" underlying the latter case, which, as stated by appellees, is that "a business—whether

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which the former concurred in the view, expressed by his predecessors in 1911 and 1917, that "the business of presenting and executing theatrical entertainments is not commerce within the constitutional sense" and hence not within the federal antitrust laws. In the light of the *Hart* decision by this Court in 1923, and the filing of the instant case by the Attorney General in 1950, these rulings must today be regarded as erroneous and without significance. It will not seriously be suggested that this Court is precluded, because of possible reliance by some persons upon these unpublished views of subordinate officials of the Department of Justice, from considering and deciding the issue of statutory construction on its merits.

baseball or something else—that consists of giving local performances for the entertainment of the public is not interstate trade or commerce in spite of the movement of persons and paraphernalia across State lines that are made necessary by the fact that local entertainment is offered from time to time at places in different States * * *." (Motion to Affirm, p. 5.)[11]

This broad interpretation of the *Toolson* case cannot be reconciled with the language of the Court's opinion, which concluded with the following sentence: "*Without re-examination of the underlying issues*, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, *supra*, so far as that decision determines that Congress had no intention of including *the business of baseball* within the scope of the federal antitrust laws." (346 U. S. at 357; emphasis added.) The Court could hardly have made a plainer statement that it was holding only that the business of baseball was not, until Congress should provide otherwise, subject to the Sherman Act. The "underlying issues" which the Court explicitly did not reach and decide, and which were reached and discussed by the dissenting Justices, were those tendered by the

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[11] A similar contention is made by appellees in No. 53, *United States* v. *International Boxing Club, et al.* They state: "Since a boxing bout, like baseball, is a purely local exhibition, * * * the principle laid down in the *Federal Baseball Club* case adhered to, on the basis of *stare decisis*, in the *Toolson* case, must be applicable here * * *." (Motion to Affirm, No. 53, p. 4.)

petitioners, namely, whether in the light of the present interstate aspects of baseball, and of recent decisions as to the scope of "interstate commerce",[12] the business of baseball should now be regarded as within the Sherman Act. The *Toolson* case affirmed no "principle of law" as to the construction either of the commerce clause or of the Sherman Act. It held only that, because of organized baseball's development in reliance on the *Federal Baseball* case and the subsequent failure of Congress to bring baseball under the antitrust laws, the Court would not reexamine the underlying issues presented, but would leave the status of baseball under the antitrust laws unchanged until and unless Congress should provide otherwise. The case cannot be read as holding that, if the question of statutory construction were reexamined on its merits, baseball would now be held not subject to the Sherman Act, or that other businesses or sports which may be comparable to baseball—in that they involve personal performances or exhibitions for public entertainment—are also exempt from the Act.

In putting its decision on so narrow a ground, the Court neither approved nor disapproved of the merits of the statutory interpretation of the Sherman Act which was made in the *Federal Baseball* case. The *Toolson* decision neither strengthened nor weakened the authority of the *Federal Baseball*

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[12] Cf. *Wickard* v. *Filburn*, 317 U.S. 111; *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533; *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219.

case as a general precedent bearing on the construction of the Sherman Act to businesses or activities other than baseball. Appellees erroneously treat the Court's explicit refusal to re-examine the underlying issues of statutory construction in *Toolson* as equivalent to a reaffirmation of the decision of those issues made in the *Federal Baseball* case. This distorts the meaning and significance of the Court's action in the *Toolson* case which was a specialized application of the doctrine of *stare decisis*.

As the Court has often recognized, "*stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula * * *." *Helvering* v. *Hallock*, 309 U. S. 106, 119. Application of the doctrine must rest upon a showing that "by the accretion of time and the response of affairs, substantial interests have established themselves," and "interests created or maintained in reliance" on the prior precedents (*ibid*).[13]

It was because of such factors—baseball's reliance upon the broad and unqualified holding in the *Federal Baseball* case that it was not subject to the antitrust laws; the failure of Congress, which had the problem under consideration, to take action;

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[13] "* * * the rule of *stare decisis* embodies a wise policy because it is often more important that a rule of law be settled than that it be settled right." Mr. Chief Justice Stone, dissenting, in *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533, at 579.

and the development of the business on the justified understanding that it was exempt from federal antitrust regulation—that the Court in *Toolson*, "[w]ithout reexamination of the underlying issues" declined "to overrule the prior decision and, with retrospective effect, hold the legislation applicable." (346 U. S. at 357.) In the present case, however, the Government is not asking the Court to overrule any prior decision relating to the application of the Sherman Act to the theatrical business. To sustain the complaint here would not involve subjecting the theatrical business "with retrospective effect" to legislation from which it has previously been held exempt by authoritative judicial decision. On the contrary, appellees are requesting the Court to hold now, for the first time since the Sherman Act was enacted in 1890, that the Act does not apply to their business. The only pertinent decision by this Court—the *Hart* case in 1923—indicated that the theatrical business in its interstate aspects was not immune from the Act. Thus, there is no reason why this Court should now deem itself barred by the doctrine of *stare decisis* from examining on its merits the question of statutory construction presented by this case, namely, whether the interstate phases of the theatrical business, as alleged in the complaint, are subject to the Sherman Act. To that question we now turn.

II

The Business of Producing, Booking, and Presenting, on a Multi-State Basis, Legitimate Theatrical Attractions Is "Trade or Commerce Among the Several States" Within the Sherman Act.

If—as has been argued above—the doctrine of *stare decisis* does not foreclose the matter, we submit that the complaint alleges restraints upon, and attempted and actual monopolization of, a business which clearly is "trade or commerce among the several States" within the meaning of the Sherman Act, and should not have been dismissed. We shall show, first, that appellees are engaged in "trade or commerce," and, secondly, that such trade or commerce is "among the several States."

A. The business of producing, booking, and presenting legitimate stage attractions, as conducted by appellees, plainly is trade or commerce. It involves such typical commercial activities as the raising of capital to finance productions (par. 25, R. 4), the hiring and payment of personnel for the production (par. 24, R. 4), the negotiation and execution of contractual arrangements for the booking and presentation of productions in theatres in a number of cities (*ibid.*; par. 30, R. 5-6), the transportation of personnel and scenery to such theatres (par. 24, R. 4), the arrangement of playing schedules at such theatres so "as to minimize lay-offs and travel between engagements" (par. 29, R. 5), and the ownership and operation of a large number of legitimate theatres throughout the country (par. 42, R. 9-10). In the course of such

activities, there is a "continuous flow" of applications, letters, contracts, memoranda, communications, money, checks, drafts, and other media of exchange (par. 48, R. 12).

Such activities constitute trade in the "broad sense" in which that word is used in the Sherman Act. *United States* v. *National Association of Real Estate Boards*, 339 U. S. 485, 491. Appellees are engaged in trade just as much as real-estate brokers (*ibid.*), producers and distributors of motion pictures (*United States* v. *Paramount Pictures*, 334 U. S. 131), an organization that provides medical care for its members (*American Medical Association* v. *United States*, 317 U. S. 519), a news-gathering and distribution agency (*Associated Press* v. *United States*, 326 U. S. 1), or insurance underwriters (*United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533). "Their activity is commercial and carried on for profit", and "[t]he competitive standards which the Act sought to preserve in the field of trade and commerce seem as relevant to the * * * [theatrical] business as to other branches of commercial activity." *National Association of Real Estate Boards* case, *supra*, p. 492.

Appellees' activities do not cease to be trade because the final product of their endeavors—the actual performance of the play—involves primarily the application of artistic talents, namely, those of actors, singers, and other performers. Many businesses deal in products which are within the category of the arts, but that does not negative

their commercial character. Motion pictures, for example, are a recognized art form, yet "[a]dmittedly * * * [their] production, distribution and exhibition—constitute a part of interstate commerce." *William Goldman Theatres* v. *Loew's*, 150 F. 2d 738, 742, 744 (C. A. 3), certiorari denied, 334 U. S. 811. It is the commercial, not the artistic, aspects of the theatrical business which are the subject of this suit.

This distinction between the two aspects of the theatrical business is clearly shown by comparing *Ring* v. *Spina*, 148 F. 2d 647 (C. A. 2), certiorari denied, 335 U. S. 813, with *San Carlo Opera Co.* v. *Conley*, 72 F. Supp. 825 (S.D.N.Y.), affirmed, 163 F. 2d 310 (C. A. 2). In the *Ring* case, the court held that a contract relating to the preparation and out-of-town try-outs of a musical play being readied for Broadway involved interstate commerce within the Sherman Act. In the *Conley* case, on the other hand, the district court held that a contract by a professional singer to sing for an opera company, which required him to travel interstate, did not relate to interstate commerce within the Federal Arbitration Act. The court distinguished the *Ring* case on the ground that it did not involve "a contract for the individual performance of an artist" (p. 831), but related to the commercial aspects of theatrical production.

Entertainment in this country today is big business, and in its interstate aspects it cannot claim exemption from the Sherman Act because performances involve primarily the skill of individual

artists. The theatrical business—the business of producing, booking, and presenting plays and other "live" theatrical attractions—is trade or commerce just as much as motion pictures, radio, television, and other forms of entertainment (also involving performances of living persons) which have been held within the Sherman Act.[11]

B. Appellees' business is carried on "among the several States." It consists of "manufacturing [producing] the commodity [the play] in one State, finding customers for it in other States, making contracts of lease [exhibition] with them, and transporting the commodity leased from the State of manufacture [production] into the States of the lessees [exhibitors]", *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 309, and it involves "a constant, continuous stream of trade and commerce between the States" (par. 49, R. 12). In the course of such business, personnel and property are assembled and are transported from state to state, contracts are made and performed under which theatrical attractions are routed to and presented in various states (*ibid.*), and there is a "continuous flow" of applications, memoranda, communications, con-

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[11] In addition to motion pictures (see cases cited, *infra*, p. 32), radio (*Lorain Journal* v. *United States*, 342 U.S. 143), and television (*United States* v. *National Football League*, 116 F. Supp. 319, 327-328 (E.D. Pa.)), the Sherman Act has been held applicable to such businesses as the licensing of rights to play popular music (*Alden-Rochelle* v. *ASCAP*, 80 F. Supp. 888 (S.D. N.Y.)), and the booking of "name bands" to ballrooms and dancehalls (*Finley* v. *Music Corp. of America*, 66 F. Supp. 569 (S.D. Calif.)).

tracts, money, checks, drafts, and other media of exchange across state lines (par. 48, R. 12).

In short, appellees' business is conducted on a nation-wide basis, "involves continuous and extensive use of the mails and instrumentalities of interstate commerce," *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 432-433, and its interstate aspects are necessary to, and inseparable from, its local aspects. Plainly, it is interstate commerce. *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *United States* v. *Griffith*, 334 U. S. 100; *Schine Theatres* v. *United States*, 334 U. S. 110; *United States* v. *Paramount Pictures*, 334 U. S. 131; *Manderville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219; *United States* v. *Women's Sportswear Mfrs. Assn.*, 336 U. S. 460; *William Goldman Theatres* v. *Loew's*, 150 F. 2d 738 (C. A. 3), certiorari denied, 334 U. S. 811.

In the motion-picture cases, *supra*, restrictions which permitted only theatres operated by the defendants to obtain films on which "photoplays" appear—restrictions exactly like those alleged here with respect to plays—were held to violate the Sherman Act. Such restrictions on exhibition were held to restrain or monopolize interstate commerce because the films which were shown in the theatres were sent from producers to distributors across state lines, and it was immaterial that the actual "showing of motion pictures is of course a local affair." *Crescent Amusement Co.* case, *su-*

pra, p. 183; cf. *Ramsay Co.* v. *Associated Bill Posters*, 260 U. S. 501; *C. E. Stevens Co.* v. *Foster & Kleiser Co.*, 311 U. S. 255. Similarly, in the instant case interstate commerce in the production, booking, and presentation of legitimate attractions is alleged to have been restrained, and interstate commerce in their booking and presentation to have been monopolized (par. 53(g), R. 14), by appellees' use of their monopoly power over legitimate theatres to force producers to book exclusively with them (par. 52, R. 13-14).[15] And it is equally immaterial here that the actual presentation of a play on the stage of a theatre "is of course a local affair".

In both industries, the restraints are on the interstate flow of the product—the film in one case, the theatrical product in the other—and it makes no difference that in the motion-picture industry the "play" has been put on film, whereas here it is the theatrical production itself which moves in interstate commerce. A theatrical production, like a motion-picture film, represents a welding together of a number of elements—script, actors, scenery, costumes, music, and lighting—into a composite whole which is distinct from its components. Cf. *Ring* v. *Spina*, 148 F. 2d 647, 650 (C. A. 2), certiorari denied, 335 U. S. 813. It constitutes an independent product which, like the film, is the subject of trade and barter. A theatri-

[15] These allegations sufficiently show restraints on interstate commerce to permit the case to go to trial. Cf. *United States* v. *Employing Plasterers Association*, 347 U.S. 186.

cal production moving across state lines with its personnel and paraphernalia certainly is no less interstate commerce than the interstate transmission of such intangible items as electric current (*Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 432; *United States* v. *Public Utilities Commission of California*, 345 U. S. 295, 300), electrical impulses over a telegraph line (*Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 11), radio (*Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 279; *Lorain Journal* v. *United States*, 342 U. S. 143), television waves (*Dumont Laboratories* v. *Carroll*, 184 F. 2d 153, 154 (C. A. 3), certiorari denied, 340 U. S. 929), or news (*Associated Press* v. *United States*, 326 U. S. 1).

In addition to the interstate movement of the theatrical productions themselves, there is present in this case the same "continuous and indivisible stream of [commercial] intercourse among the states" that led this Court to hold, in *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533, that the business of fire insurance constitutes interstate commerce. As already noted, the complaint alleges (pars. 48, 49, R. 12) that, in the usual course of appellees' business of producing, booking, and presenting legitimate attractions, there is a "continuous flow" of applications, letters, memoranda, communications, contracts, money, checks, drafts, and other media of exchange across state lines. This use of "[t]he mails and the instrumentalities of interstate commerce [is] vital

to the functioning of," and "involve[s] the very essence of" appellees' business, and these "interstate commercial transactions * * * are commerce which concerns more states than one." *North American Co.* v. *Securities and Exchange Commission*, 327 U. S. 686, 694, 695. See also *Polish Alliance* v. *National Labor Relations Board*, 322 U. S. 643; *International Textbook Co.* v. *Pigg*, 217 U. S. 91.

To the extent that the *Federal Baseball* case may be read as reflecting the view that the Sherman Act is inapplicable to interstate business where the "subject of commerce" is an "exhibition" or "personal effort", that view has been undermined in subsequent cases, particularly *Hart* and the motion picture, insurance, medical care, and real estate broker decisions (*supra*, pp. 20-21, 29, 32-33, 34-35).[16] In any event, there is no plausible basis for contending that the Sherman Act of 1890 should be construed to cover only the area of "commerce" defined by this Court in 1922. This Court, distinguishing cases like *Helvering* v. *Griffiths*, 318 U. S. 371, and *Parker* v. *Motor Boat Sales*, 314 U. S. 244,

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[16] In holding in *Federal Baseball* that the transportation of players and equipment was merely incidental, this Court relied on *Hooper* v. *California*, 155 U.S. 648. That case upheld a California statute regulating the insurance business, against the challenge that it restrained interstate commerce, on the ground that "[t]he business of insurance is not commerce" (p. 655). The authority of the *Hooper* case was severely shaken, if not overruled, by the *South-Eastern Underwriters* case, *supra*. Cf. *Lorain Journal* v. *United States*, 342 U.S. 143, 151-152.

stated in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 557-558, "We have been shown not one piece of reliable evidence that the Congress of 1890 intended to freeze the proscription of the Sherman Act within the mold of then current judicial decisions defining the commerce power. On the contrary, all the acceptable evidence points the other way." This is *a fortiori* true here, where the Sherman Act of 1890 is sought to be frozen within the mold of a judicial decision *(Federal Baseball)* rendered thirty-two years later, the scope of which was narrowed by a decision the following year *(Hart)*.

Whatever the validity of appellees' interpretation of *Federal Baseball* as applied to the business of "giving local performances or exhibitions," it is not applicable to the business of producing, booking, and presenting, on a multi-state basis, legitimate theatrical attractions. The restraints alleged in this case are not on the local exhibition of plays, but on the entire theatrical business, with its myriad of interstate aspects. In the theatre the play's the thing, but in the theatrical *business* there are many things: actors, stage hands, press agents, authors, agents, producers, "angels", theatre owners, directors, designers, scenery, costumes, lighting, music, bookings, out-of-town try-outs, etc. The "first night" of a play is, in fact, the last night of a process—commercial as well as artistic—of integrating these component persons and things into a presentation which, it is hoped, the public will ap-

preciate and patronize. This theatrical business does not lose its character as "trade or commerce" because the end-product is a dramatic work offered to the public in local theatres. The same reasoning would permit a national book publisher or distributor to assert that he is not engaged in "trade or commerce" because the end-product of his business is a literary work offered to the public in local bookshops.

In conclusion, appellees would use the *Toolson* case to create an exemption from the Sherman Act for the theatrical business. But the exemption which baseball now has results solely from the application of the doctrine of *stare decisis* and, as we have shown, there is no basis for applying that doctrine to require a decision that the theatrical business is not subject to the Act. We have also shown that, on the basis of applicable decisions of this Court, the theatrical business is covered by the Act; granting it an exemption would require the *pro tanto* overruling of those decisions. "[I]f exceptions are to be written into the [Sherman] Act, they must come from the Congress, not this Court." *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533, 561.

CONCLUSION

The judgment of the district court dismissing the complaint should be reversed.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.
STANLEY N. BARNES,
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PHILIP ELMAN,
DANIEL M. FRIEDMAN,
Special Assistants to the Attorney General.

AUGUST, 1954.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 36

UNITED STATES OF AMERICA,

Appellant,

vs.

LEE SHUBERT, JACOB J. SHUBERT, MARCUS HEIMAN, UNITED BOOKING OFFICE, INCORPORATED, SELECT THEATRES CORPORATION, L.A.B. AMUSEMENT CORPORATION,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

ALFRED MCCORMACK,
Counsel for Appellees.

WILLIAM KLEIN,
GERALD SCHOENFELD,
AARON LIPPER,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 647

UNITED STATES OF AMERICA,

Appellant,

vs.

LEE SHUBERT, JACOB J. SHUBERT, MARCUS HEIMAN, UNITED BOOKING OFFICE, INCORPORATED, SELECT THEATRES CORPORATION, L.A.B. AMUSEMENT CORPORATION,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN CIVIL ACTION NO. 56-72

Appellee moves the Supreme Court of the United States, pursuant to Rule 7, paragraph 4, and Rule 12, paragraph 3, of its Revised Rules, that the final judgment of the District Court be affirmed.

The ground of such motion is that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Opinion Below

The opinion of the District Court for the Southern District of New York (Judge Knox), which has not yet been reported, is quoted in full under the next heading.

Proceedings Below

The complaint was filed February 21, 1950. It charges violations of Sections 1 and 2 of the Sherman Act in one or more of the three branches into which the Government has divided the "legitimate" theatrical business, (1) "production", *i.e.*, putting together dramatic and musical attractions for the legitimate theatre; (2) "booking", *i.e.*, arranging for legitimate theatres to obtain attractions to be played in them, and scheduling the playing of such attractions in "try-out" towns, in New York and on tours "on the road"; and (3) "presentation", *i.e.*, giving performances of the play in the selected theatres.

The answers of the appellees were filed on May 31, 1950. At the time of the decision in *Toolson* v. *New York Yankees*, 21 L.W. 4014, on November 9, 1953, numerous pre-trial proceedings had been had and others were in progress.

On November 24, 1953, in reliance on the *Toolson* decision, appellees moved to dismiss the complaint on the grounds (a) that the Court did not have jurisdiction of the subject matter of the action and (b) that the complaint did not state a claim upon which relief could be granted.

The District Court (Judge Knox) granted the motion, and final judgment was entered on December 30, 1953. The opinion of Judge Knox reads as follows:

> "In principle, I can see no valid distinction between the facts of this case and those which were before the Supreme Court in the cases of *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U.S. 200, and *Toolson* v. *New York Yankees*

et al., decided by the Supreme Court on November 9, 1953.

"Upon the authority of these adjudications the complaint in the above entitled action will be dismissed."

For brevity we shall refer to *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U.S. 200, as the *Old Baseball* case.

Argument

THE DECISION OF THIS CASE IS GOVERNED BY THE *OLD BASEBALL* CASE AND THE *TOOLSON* CASE.

The legitimate theatrical business is not distinguishable from organized baseball in its interstate commerce aspects. In both businesses, performances by living players are given at particular places for the entertainment of the public. Tickets of admission are offered for sale, and those who have tickets are admitted. Uniformly in the baseball business, and often in the theatrical business, the players must move from State to State because the places where the performances are given are in different States. The performances are "booked" in the same sense in both businesses. That is, arrangements are made for the places of entertainment to be available on particular days for particular performances. The end of the whole business is the performance—a purely local show, an intra-state matter.

The jurisdictional allegations of interstate commerce in the complaint in the present action are summarized in paragraph 49 as follows:

> "In the course of producing, booking and presenting legitimate attractions, there is a constant, continuous stream of trade and commerce between the States of the United States, consisting of the assemblage of personnel and property for rehearsals, the transportation of said personnel and property to various cities throughout the United States, the making and performing of

contracts under which attractions are routed and presented in various States of the United States, and the transmission of applications, letters, memoranda, communications, commitments, contracts, money, checks, drafts and other media of exchange across State lines."

As the records and opinions in the *Old Baseball Club* case and the *Toolson* case clearly show, every word of the above-quoted paragraph of the complaint applies equally well to organized baseball as to the legitimate theatre. There is the same kind of "stream of commerce between the States" in baseball as in the theatre business, the same kind of "assemblage of personnel and property for rehearsal" (winter practice in the South) and the same kind of "transportation of said personnel and property to various cities throughout the United States"; and it is for the same purpose—"the performing of contracts under which attractions (baseball teams) are routed and presented in various States", and finally there is in baseball, as in the theatre business, "the transmission of applications, letters, memoranda, communications, commitments, contracts, money, checks, drafts and other media of exchange across State lines."

In applying the doctrine of *stare decisis* in the *Toolson* case, this Court stated that it was following the *Old Baseball* case "so far as that decision determines that Congress had no intention of including the business of baseball within the federal anti-trust laws". That determination was made in the *Old Baseball* case, not upon the basis of any finding as to the subjective intent of Congress, but upon the basis of a principle of law to the effect that the business of giving local performances or exhibitions by living persons for the entertainment of the public, from time to time at localities in different States, is not interstate trade or commerce in spite of the necessary movements of persons and paraphernalia across State lines.

That principle in turn rested upon two subordinate principles, which were stated in substance as follows:

> (a) Such a business is not *trade or commerce* ("personal effort not related to production is not the subject of commerce", see 200 U.S. at 209); and
>
> (b) It is not interstate ("exhibitions of baseball . . . are purely state affairs"; and "That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place" (200 U.S. at 208-09).

If *stare decisis* relates to principles of law, and if there is not to be one law for organized baseball and a different law for other businesses, though they be indistinguishable from baseball in their interstate aspects, then the *Toolson* case stands for the proposition that a business—whether baseball or something else—that consists of giving local performances for the entertainment of the public is not interstate trade or commerce in spite of the movements of persons and paraphernalia across State lines that are made necessary by the fact that the local entertainment is offered from time to time at places in different States; and it also stands for the proposition that such a business either is not *trade or commerce* at all or, if trade or commerce, is not *interstate* in character.

Whether such a business is or is not trade or commerce and, if it is, whether the trade or commerce is interstate in character, were the "underlying issues" which, in the *Toolson* case, this Court said it was not re-examining.

Our position is that it has now been established, by application of the doctrine of *stare decisis* in the *Toolson* case, that as a matter of law the giving of local performances for the entertainment of the public, from time to time at places in different States, is not interstate trade or commerce within the meaning of those words in the Sherman Act.

Review of the Authorities

The decisions relating to baseball and those relating to the theatrical business have been inextricably interwoven since the *Old Baseball* case was presented to this Court. In earlier cases involving the theatrical industry, *People* v. *Klaw*, 55 Misc. 72 (N.Y. 1907) and *Metropolitan Opera Co.* v. *Hammerstein*, 162 App. Div. 691 (N.Y. 1914), it had been decided that the vaudeville and operatic branches of the theatrical businesses were not interstate commerce.

Then came the decision of Judge Learned Hand in *H. B. Marienelli* v. *United Booking Offices of America*, 227 Fed. 165, a civil anti-trust suit between private parties, involving the vaudeville branch of the theatrical business. Marienelli was a booking agent for vaudeville acts. The defendants were the two large vaudeville circuits (Keith and Orpheum) and the booking agencies which they controlled. The complaint alleged in substance that the defendants had combined and conspired to monopolize all vaudeville booking and to exclude plaintiff from it, and that they had blacklisted him and destroyed his business. Judge Hand held that the complaint was proof against demurrer. He reasoned that interstate commerce was involved in the business, in that vaudeville performers and their paraphernalia, stage scenery and advertising moved from State to State in fulfillment of the booking contracts; that the effect of the alleged conspiracy on that interstate commerce was "direct" rather than "indirect"; and that therefore the Sherman Act was applicable.

Prior to the decision of the *Marienelli* case, the Attorney General had been called upon (in 1911) to rule on whether the federal anti-trust laws applied to the theatrical business; and after the *Marienelli* decision the Attorney General was called upon twice to rule on the same question—in 1917 and

in 1920. All the rulings were to the effect that the anti-trust laws did not apply to the theatrical business.

Only the last of the three rulings has been available to us, and that has been available only because, the Department of Justice having declined to produce it upon our request, on the ground that it was "confidential", we made a search of the records and briefs in the *Old Baseball* case and the later cases and found that in one of the briefs the 1920 opinion had been quoted in full.[1] The Government then admitted the authenticity of the ruling, which refers to the two earlier rulings and reads as follows:

April 2nd, 1920.

Hon. Victor Murdock,
Chairman, Federal Trade Commission,
Washington, D. C.

Sir:

Receipt is acknowledged of your favor of March 27th transmitting your records in the case of the *Federal Trade Commission* v. *The Vaudeville Managers' Protective Association, et al.*[2]

This subject has previously been considered by the Department, and my predecessors on January 28, 1911, and again on March 24, 1917, took the view that the business of presenting and executing theatrical entertainments is not commerce within the constitutional sense, and that, therefore, such a combination as that involved in this case does not fall within the Acts of Congress prohibiting combinations in restraint of interstate commerce.

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[1] Brief for Orpheum Circuit, Inc. (at pp. 25-26) in *Hart* v. *B. F. Keith Vaudeville Exchange*, 12 F. 2d 341.

[2] The docket of the Federal Trade Commission in the above-entitled matter (No. 128-1918) discloses that the complaint was filed in 1918; that in March 1920 the record of the proceeding was referred to the Department of Justice; and that, following receipt of the above-quoted letter of the Assistant to the Attorney General, the complaint was dismissed by the Commission.

I see no reason to depart from the views of my predecessors, and, therefore, I am returning herewith your records.

Respectfully,
(Signed) C. B. Ames,
Assistant to the Attorney General.

Enclosure 16972.

Thus when the *Old Baseball* case came before this Court for decision, the Department of Justice had twice declined to follow the reasoning of the *Marienelli* case, and three times—under three different Attorneys General—had arrived at a contrary conclusion on the question of interstate commerce in respect of the theatrical business.

In arguing the *Old Baseball* case before this Court, counsel for the baseball interests, Mr. George Wharton Pepper, cited as one of his authorities the rulings of the Department of Justice applicable to the theatrical business.

In the *Old Baseball* case the District Court had followed the *Marienelli* case, and had directed the jury to find for the plaintiff on the interstate commerce issue.[3] The Court of Appeals reversed (269 Fed. 681); and this Court affirmed the Court of Appeals.

The *Marienelli* case was clearly overruled by the *Old Baseball* case, which had been cited in this Court by the plaintiff as an authority that was "particularly" applicable (see 200 U.S. at 205).

The next case in chronological order is the *Hart-Keith* litigation, which came to this Court in 1923, *Hart* v. *Keith Exchange*, 262 U.S. 271. Hart, like Marienelli, was a booking agent. The principal defendants were the same as in the *Marienelli* case, except that in the interval between the two cases the booking offices of the two major vaudeville

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[3] See opinion of Court of Appeals for the District of Columbia, 269 Fed. 681, 684.

circuits (Keith and Orpheum) appear to have been combined into one.

The complaint alleged that the defendants owned or controlled and operated 103 vaudeville theatres in 78 cities in the United States and Canada, and by various means had monopolized the business of operating vaudeville theatres and the business of booking acts into vaudeville theatres (their own and those of others), excluding plaintiff and ruining his business. The complaint was long and detailed (55 pages in the CCA record); and from the excerpts which we annex as Appendix A hereto it may be seen that the draftsmen bent every effort to make a showing of the interstate aspects of the vaudeville branch of the theatrical business.

When the case came on for trial, the District Court (Judge Mack) dismissed the complaint without taking testimony. Citing the *Old Baseball* case, he held that the alleged conspiracy was not in interstate commerce, that the complaint did not state a case under the Sherman or Clayton Act, and that therefore the Court was without jurisdiction. In announcing his ruling, Judge Mack disposed of the *Marienelli* case with the following remarks:[4]

> "If the criterion laid down by Judge Hand in his decision in the *Marienelli* case had been adopted by the Supreme Court, this case would be clear, because it falls clearly within the *Marienelli* case. In my judgment, however, the Supreme Court in the baseball case has not adopted that criterion, but it adopted one which practically is that the dominant object of the parties in respect to the matters complained of must affect or be interstate commerce; and in my judgment, that is so neither in the case of the defendants nor in the case of the plaintiff."

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[4] Printed in the brief for Orpheum Circuit, Inc., et al., before the Court of Appeals (12 F. 2d 341). In the quotation we have corrected a misspeling of "Marienelli".

On appeal to this Court from Judge Mack's decision, the appellees (defendants) relied, of course, on the *Old Baseball* case, contending that in the theatrical business, "the dominant object of all the arrangements was the performance of the actors, all the transportation being incidental to that." The countervailing argument of the plaintiff, as summarized in the opinion of Mr. Justice Holmes, was "that in the transportation of vaudeville acts, the apparatus sometimes is more important than the performers, and that the defendants' conduct is within the statute *to that extent at least*" (262 U.S. at 273; emphasis ours).

This Court decided, in substance, that it could not say positively, from an examination of Hart's 55-page complaint, there was not some aspect of the vaudeville business that involved interstate commerce within the meaning of the Sherman Act. Mr. Justice Holmes in his opinion referred to the rule that "a claim that if well founded is within the jurisdiction of the Court . . . is within that jurisdiction whether well founded or not", and said (at p. 274; emphasis ours):

> "It is enough that we are not prepared to say that *nothing can be extracted* from this bill that falls under the act of Congress, or *at least* that the claim is wholly frivolous."

On remand to the District Court the case was tried before Judge A. N. Hand. After hearing the plaintiff's testimony, he granted defendants' motion to dismiss. In doing so, he said of this Court's decision in *Hart* v. *Keith Exchange* (Record in 12 F.2d 341, fols. 3222-23):

> "Mr. Justice Holmes writing in the Supreme Court in this case (Hart vs. Keith) decided nothing more than that upon the complaint with its extensive allegations relating to interstate commerce the trial court ought to have gone into the facts, and not have dismissed on the pleadings."

He then went on to decide that "the interstate commerce shown is incidental to the primary thing, that of entertainment" and that, therefore, the dismissal of the bill was required by the *Old Baseball* case.

The Court of Appeals unanimously affirmed. In its opinion it dealt with the argument, which Mr. Justice Holmes had summarized, that "in the transportation of vaudeville acts, the apparatus" might sometimes be "more important than the performers". The Court of Appeals dealt with the statistics of acts alleged to be in that category, and concluded that they were so small a portion of the sum total of vaudeville acts as to be "incidental"; and it then went on to conclude that the transportation of animals, costumes and paraphernalia were only incidental to the local performances, saying (at p. 344):

> "It is sufficient to liken such property to that of the baseball players' masks, balls, and bats used by them, and which were considered incidental in the Federal Baseball Case."

This Court denied *certiorari*, *Hart* v. *B. F. Keith Vaudeville Exchange*, 273 U.S. 703. We do not draw the prohibited inference from the denial of *certiorari*, but we point to a necessary effect of such denial, which is relevant to the application of the *Toolson* doctrine to this case—that by denying *certiorari* this Court allowed the decision of the Circuit Court of Appeals to stand, and the theatrical industry to remain outside of the scope of the Sherman Act—at least in the Circuit in which the major activities of the theatrical business are conducted.

Next in the chronology of cases is *Ring* v. *Spina*, 148 F.2d 267, decided by the Court of Appeals for the Second Circuit in 1945. The case involved the validity under the antitrust laws of the so-called Minimum Basic Agreement of the Dramatists' Guild of the Authors League of America,

The District Court had denied injunctive relief pending trial, holding that the theatrical industry was not within the Sherman Act. A two-judge Court of Appeals, consisting of Circuit Judge Clark and Judge Evans, visiting from the Seventh Circuit, reversed, holding that plaintiff had made out a *prima facie* case for relief.

Judge Clark wrote the opinion. He construed the *Hart* v. *Keith* cases and the *Old Baseball* case as holding only "that contracts for the personal services for exhibition purposes as vaudeville and baseball artists were not in interstate trade or commerce, even though the actual exhibitions were to take place in different states;" and even as thus construed, he expressed "doubt" as to "the presently controlling force of these precedents." (148 F.2d at 650).

As the later cases show, the views of Judge Clark as to the force of the *Hart* case and the *Old Baseball* case as precedents were not shared by his fellow judges of the Court of Appeals for the Second Circuit.

The *Ring* v. *Spina* case went up to the Court of Appeals again, after trial, under the title *Ring* v. *Authors' League of America*, 186 F. 2d 637, before Judges Learned Hand, Swan and Chase. The trial court, following the reasoning of Judge Clark, had submitted to the jury the question of whether the defendants had violated the antitrust laws and whether, if so, the plaintiff had suffered any damage thereby. The jury found in the affirmative on the first question and in the negative on the second. Accordingly, the court denied damages but granted injunctive relief. On appeal, the judgment was modified to eliminate the injunctive relief, upon the ground that plaintiff was not entitled to it on the facts.

The Court of Appeals did not have to decide the antitrust issues; but because the interstate commerce issue had been decided preliminarily on the earlier appeal, and

because the jury had found that the antitrust laws had been violated. Judge Hand did deal with the issue to an extent sufficient to erase the case as a precedent on the antitrust issues. After remarking that the defendants' protestations of innocence of antitrust violations were "relevant in deciding whether we should decide issues in which the plaintiff has only the most shadowy interests", and declaring that injunctive relief should not have been granted, Judge Hand said (186 F. 2d at 643):

> "However, we hasten to add that we leave open all legal questions which such issues involve; we wish to make it entirely clear that we are not to be understood either to throw any doubt upon, or to affirm, what we said when we granted the temporary injunction; we merely decide that the necessity for such affirmance does not arise."

As we read Judge Learned Hand's words, they mean that Judge Clark's opinion in *Ring* v. *Spina* must not be understood as deciding anything, one way or the other, on the question of whether the theatrical business is within the scope of the antitrust laws.

The last of the pertinent cases in the Second Circuit, *Conley* v. *San Carlo Opera Co.*, 163 F. 2d 310, *affirming* 72 F. Supp. 825, clearly shows the view of the Court of Appeals of that Circuit as to the binding force of the *Old Baseball* case and the *Hart* case as precedents, and their applicability to the theatrical business. The case involved arbitration under a contract between Conley, a singer, and the defendant, a traveling opera company; and it turned upon the question whether, because under the contract "Conley would have been required to travel through the various states giving performances at individual opera houses as arranged by the San Carlo Company" (72 F. Supp. at 831), the contract was one involving interstate commerce.

The District Court (Judge Leibell)—relying on the *Old Baseball* case, the *Hart* case and *Neugen* v. *Associated Chautauqua Co.*, 70 F. 2d 605—held that it was not, and granted the defendant's motion to dismiss for lack of jurisdiction.

The Circuit Court of Appeals, in a *per curiam* opinion, dealt with the question of interstate commerce as follows (163 F. 2d 310; emphasis ours):

> "'We have nothing to add to Judge Leibell's discussion of the question of jurisdiction. He thought that decision was controlled by Federal Baseball Club v. National League, 259 U. S. 200, and Hart v. B. F. Keith Vaudeville Exchange, 2 Cir., 12 F. 2d 341, Certiorari denied 273 U. S. 704. We concur. This court intimated in Ring v. Spina, 2 Cir., 148 F. 2d 647, 650, that these authorities should not be applied "beyond their exact facts, *but in the case at bar it is unnecessary to do so; they are precisely in point.* Judgment affirmed.'"

If the *Old Baseball* case and the *Hart* case were precisely in point with respect to an opera company which traveled from State to State throughout the country with its actors, ballet troupes and the elaborate costumes and scenery that performances of opera require, they are no less precisely in point in the present case.

The *Toolson* case shows that the theatrical business, like the baseball business, has been allowed to develop over a long period of years upon the premise that the Sherman Act did not apply to it; and, in spite of the decisions to that effect, Congress has not seen fit to change the law so as to bring the theatre within its scope. In such a situation, as this Court ruled in the *Toolson* case, it is for Congress, and not the courts, to amend the law if evils exist for which a remedy is required.

Before the court below the Government argued

(1) that the decision in the *Toolson* case is applicable solely to baseball, and does not apply to any other business, however similar it may be to baseball and its interstate aspects;

(2) that the complaint in this action (in some unspecified particulars) contains broader allegations of interstate commerce than did the *Hart* complaint;

(3) that the various motion picture cases are controlling and establish that the allegations of interstate commerce in the complaint in this action are sufficient to bring the case within the Sherman Act; and

(4) that, because this Court in *Hart* v. *Keith Exchange* held that a trial was necessary for a decision of the interstate commerce issue, this case must also be tried upon evidence, and was not properly decided on a motion to dismiss.

The first contention amounts to an assertion that, because the baseball business happened to be involved in a case in which certain principles of law were developed, it is the only business to which such principles apply. No authority for such a proposition has been cited; and we believe that none can be found.

The second contention is easily disposed of by a comparison of Appendix A (excerpts from the *Hart* complaint) with the complaint in the present action.

The third contention—that this case is governed by the motion picture cases—is without merit, since those cases turned upon the fact that the trade involved in them was the shipment of motion picture films in interstate commerce. The distinction goes back at least as far as Judge A. N. Hand's opinion in the *Hart* case, wherein he said (Record in 12 F.2d 341, fols. 3223-24):

> "The decision of the Supreme Court in the Binderup vs. Pathe Exchange (263 U.S. 291) case is based, in my opinion, upon the fact that the subject there was

the shipment of motion pictures, and the decision of the Supreme Court in the case of Rankin Co. vs. Billposters Co. (260 U.S. 501) is likewise based upon the ground that the shipment of posters was there a primary rather than an incidental subject of the action."

The fourth contention—that this case has to be tried on evidence because the *Hart* case had to be tried on evidence—is plainly without substance. The sufficiency of allegations of interstate commerce was tried out in the various baseball cases [3] on motions identical to the one made below; and there is no more reason for trial on evidence in the present case than there was in those cases.

Except for the temporary difficulty which this Court had in passing upon the sufficiency of the 55-page complaint in the *Hart* case, the decisions involving the baseball business and the theatrical business have treated the two businesses as the same in their interstate commerce aspects. There is no valid basis for a distinction between them in respect of the interstate commerce issue. Therefore the *Old Baseball* case, by reason of the decision in the *Toolson* case, is *stare decisis* with respect to the present action.

Conclusion

The judgment of the District Court should be affirmed or, in the alternative, the appeal of the Government should be dismissed as insubstantial.

Respectfully submitted,

ALFRED MCCORMACK,
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[3] For example, the *Toolson* case (101 F. Supp. 93, aff'd, 200 F. 2d 198); *Kowalski* v. *Chandler*, 202 F. 2d 413; and *Corbett* v. *Chandler* (6th Circuit), not yet reported.

APPENDIX A

"XVI. . . . The proprietors own, lease or control theatres and playhouses, at which and in connection with which they employ numerous persons, such as stage hands, property men, carpenters, electricians, ushers, ticket sellers, stage managers, conductors and musicians; they purchase and cause to be manufactured and shipped to them at such theatres and playhouses large quantities of valuable scenery, furniture, fixtures and costumes, some of which is purchased in a State other than that in which such theatre or playhouse is located, and shipped from such State to the State where such theatre or playhouse is located; these proprietors also purchase and cause to be manufactured for and shipped to them great quantities of advertising matters, such as bill posters and hand bills, much of which they cause and procure to be transported in interstate and foreign commerce; they also cause and procure to be printed, and thereafter offer the same for sale, and do sell, tickets of admission to the entertainments which they are engaged in producing, and for which tickets they receive large sums of money.

". . .

"Such acts are generally booked in New York, and the contracts contemplate and result in the transportation of the acts, which, of course, include the performers, scenery, music, costumes, and whatever constitutes the act, from State to State, and from, to, through and among the various States and Territories of the United States of America, and of the District of Columbia, and the said business has grown to such proportions, that there is a constant stream of commerce in and among the States and from State to State, and through the various Territories of the United States, in said business.

"The transportation of these acts is not only an essential element of the contracts, but is one of the greatest importance involving in many cases, the use of large quantities of accessories, and special transportation equipment and facilities.

"XIX. . . . Plaintiff's business as such manager and personal representative, among other things, has consisted and does consist in contracting with such performers to negotiate for them with the proprietors of theatres and playhouses for the employment of such performers by said proprietors; to arrange a series of employments in various countries and cities; to arrange an itinerary of performances for such performers so as to keep them continuously employed, and to reduce the amount and expense of their traveling to a minimum; to furnish such performers with information as to the most available and satisfactory routes of travel, the most satisfactory hotels at which to stop, the customs and manners of the various countries which they are to visit, and where they are to travel from one country to another; to arrange for such performers the necessary papers to be used in their dealings with the customs, immigration and other Government officials. Many of the performers who have employed plaintiff's services are actors, performers, jugglers, conjurers, acrobats and various other kinds of entertainers, operating either alone or what is known as acts or troupes acting together, who as a part of their performances have to and do avail themselves of the use of large quantities of scenery, costumes, fixtures and apparatus, animals, birds and reptiles, which belong to them and which they carry with them from place to place and from state to state in the United States of America; in such cases where plaintiff has been employed as manager or personal representative, he in many instances as a part of his employment has attended to the transportation and shipment of such scenery, costumes, fixtures, apparatus, animals, birds and reptiles, and in many cases this is and has been a very large part of plaintiff's business aforesaid. Most, if not all, of the performers engaged in vaudeville have advertising matter, consisting of bill posters and photographs, which are distributed, posted and circulated in the cities where such performers are to appear, and as a part of plaintiff's business as manager and personal representative for such performers he has attended and does attend to the procuring of such advertising matter and to the preparation of the same, and to its shipment from one

country to another and from one state to another state in the United States, and to its publication and distribution in advance of the appearance of such performers, and produces and assists in the production and staging of acts; . . .

"XXIV. Defendants E. F. Albee, Proctor, Meyerfeld, Jr., Beck and J. J. Murdock, and other of the defendants herein, either together and or alone, as hereinbefore stated, own or control and operate a large number of theatres throughout the United States; . . . said defendants also, in connection with and as a part of the said business, employ agents, who are located in the City of New York, who act for them in employing persons to perform in vaudeville for them in their aforesaid theatres, and through such agents said defendants from time to time enter into contracts with performers such as actors, acrobats, athletes, conjurers, jugglers, singers, musicians and various other entertainers, wherein and whereby said performers agree to travel from one city in one state to another city in another state of the United States and to perform in vaudeville for said defendants at their theatre in the latter place, and as a result of such contracts performers do travel and have traveled from one state to another state of the United States and have performed and do perform in vaudeville for said defendants at their aforesaid theatres, and such performers have been and are paid for such services by said defendants, and as a part of their aforesaid business said defendants have entered into and do enter into contracts with performers wherein and whereby such performers have agreed and do agree to come to the United States from a foreign country, and upon arriving in the United States to perform in vaudeville for said defendants at their aforesaid theatres, and wherein and whereby said defendants have agreed and do agree to pay said performers for such services, and as a result of such contracts said performers have and do come to the United States from foreign countries, to wit, Europe, Asia and other countries, and have performed and do perform in vaudeville for said defendants at their aforesaid theatres, and have been and are paid therefor by said defendants. And, in many instances, said performers have brought, and do bring with

them, from such foreign countries to the United States, large quantities of paraphernalia such as scenery, costumes and fixtures, animals, birds and reptiles, which they have transported and caused to be transported to the United States, and from one city in one state to another city in another state of the United States in connection with and as a part of their work in performing for said defendants in vaudeville at their aforesaid theatres as aforesaid; wherefore plaintiff claims defendants to have been and to be engaged in trade and commerce among the several states of the United States and with foreign nations within the meaning of the Act of Congress approved July 2, 1890, and entitled, 'An Act to protect trade and commerce against unlawful restraints and monopolies'.

"XXV . . . in connection with and as a part of their aforesaid domination, management and control of said theatres they [defendants] have caused and procured, at all times herein mentioned, their agents, servants and employees in the City and State of New York to enter into and conduct negotiations with performers looking to the employment of such performers to appear and perform for them in vaudeville at such theatres; and as a result of such negotiations, said agents, servants and employees have caused and procured contracts to be entered into and do cause and procure such performers to travel from said City of New York to said theatres in states other than the State of New York, and to perform in vaudeville for said defendants and their aforesaid corporations, and said defendants have caused and procured and do cause and procure said performers to be paid therefor; and so plaintiff claims defendants to have been and to be engaged in business, trade and commerce, among the several states of the United States, within the meaning of the aforesaid Act of Congress.

"XXVI. On information and belief, that the defendants E. F. Albee, Proctor, Meyerfeld, Jr., and Beck, in connection with and as a part of the business of producing vaudeville at the theatres dominated, managed and controlled by them, as stated in the last preceding paragraph, have at all times herein mentioned caused and procured their agents, serv-

ants and employees located in the City and Southern District of New York to enter into and conduct negotiations with vaudeville performers located in Europe, looking to and resulting in said vaudeville performers coming to the United States of America to perform for hire in vaudeville performances at said theatres; and in such instances, and there have been many such, that being a regular part of said defendants' business, said performers have so come to the United States as a result and because of written agreements between them and said defendants' agents, servants and employees aforesaid; and in many such cases said performers, in compliance with and as a part of their aforesaid agreements, have brought with them and caused and procured to be transported from Europe to the United States, large quantities of scenery, fixtures, costumes, animals, birds and reptiles and other paraphernalia; and for their coming to the United States, and bringing and causing to be brought such paraphernalia as aforesaid, and for performing in vaudeville at such theatres, said defendants have at all times herein mentioned caused and procured said vaudeville performers to be paid; and so plaintiff claims defendants to be, and at all times herein mentioned to have been, engaged in business, trade and commerce with foreign nations within the meaning of the aforesaid Act of Congress.

"XXIX. . . . And in conducting the aforesaid negotiations looking to and resulting in the employment of said performers as aforesaid, and as a part of its business, said defendant has caused and procured said performers to agree to travel from one state to another state in the United States and to perform in vaudeville in such latter state; and as a result of such agreements said performers have traveled and do travel from one state to another state in the United States; and in such negotiations, and as a part of its said business said defendant has caused and procured performers to agree to travel from a foreign country to the United States and to perform in vaudeville in the United States, and as a result of such agreements said performers have traveled from foreign countries, to wit, Germany, France, England, Australia and other countries to the

United States and have, after such travel, performed in vaudeville in the United States; and in such negotiations, and as a part of its said business, said defendant has caused and procured performers to agree to travel from the United States to and to perform in vaudeville in the Dominion of Canada, and as a result of such agreements said performers have traveled from the United States, and after such travel have performed in vaudeville in the Dominion of Canada, and so plaintiff claims defendant to have been and to be engaged in trade and commerce among the several states of the United States and with foreign nations within the meaning of the aforesaid Act of Congress; . . .

"XXX. . . . and as a part of its business, said defendant has caused and procured said performers to agree to travel from one state to another state in the United States and to perform in vaudeville in such latter state; and as a result of such agreement said performers have traveled and do travel from one state to another state in the United States; and in such negotiations, and as a part of its said business, said defendant has caused and procured performers to agree to travel from a foreign country to the United States and to perform in vaudeville in the United States, and as a result of such agreements said performers have traveled from foreign countries, to wit, Germany, France, England, Australia and other countries to the United States, and have, after such travel, performed in vaudeville in the United States; and in such negotiations, and as a part of its said business, said defendant has caused and procured performers to agree to travel from the United States to, and to perform in vaudeville in, the Dominion of Canada, and as a result of such agreements said performers have traveled from the United States to, and after such travel have performed in vaudeville in, the Dominion of Canada; and so plaintiff claims defendant to have been and to be engaged in trade and commerce among the several states of the United States and with foreign nations within the meaning of the aforesaid Act of Congress; . . ."

Supreme Court of the United States

OCTOBER TERM, 1954

No. 36

UNITED STATES OF AMERICA,
Appellant,

v.

LEE SHUBERT, JACOB J. SHUBERT, MARCUS HEIMAN, UNITED BOOKING OFFICE, INCORPORATED, SELECT THEATRES CORPORATION, L. A. B. AMUSEMENT CORPORATION,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

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UNITED STATES OF AMERICA, *Appellant*, v. LEE SHUBERT, JACOB J. SHUBERT, MARCUS HEIMAN, UNITED BOOKING OFFICE, INCORPORATED, SELECT THEATRES CORPORATION, L. A. B. AMUSEMENT CORPORATION, *Appellees.*	No. 36

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

Opinion Below

The opinion of the District Court (R. 18) has been reported at 120 F. Supp. 15.

Jurisdiction

The judgment of the District Court was entered December 30, 1953 (R. 18). A petition for appeal was filed on February 18, 1954, and allowed on the same day (R. 24-25). The jurisdiction of this Court is invoked under the Act of June 25, 1948, § 17, 15 U. S. C. 29, 62 Stat. 989.

Question Presented

This appeal presents a question of construction of the Sherman Act, *viz.*, whether the business of the legitimate theatre is within its scope.

More specifically, the question is whether the legitimate theatrical business is "trade or commerce among the several States", as that term was used by Congress in Sections 1 and 2 of the Act. Put into the terminology employed in *Toolson* v. *New York Yankees*, 346 U. S. 356, the question is:

> "Did Congress intend to include the business of the legitimate theatre within the scope of the federal antitrust laws?"

Statute Involved

The relevant provisions of Sections 1 and 2 of the Sherman Act (15 U. S. C. 1, 2) are as follows:

> "SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, * * * is hereby declared to be illegal: * * *.
>
> "SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, * * * shall be deemed guilty of a misdemeanor, * * *."

Statement

The complaint, charging violations of Sections 1 and 2 of the Sherman Act, was filed February 21, 1950. The de-

fendants named were (a) the brothers Lee and Jacob J. Shubert and Select Theatres Corporation (Select), of which they owned a majority of the capital stock; (b) Marcus Heiman and a corporation wholly owned by him, L. A. B. Amusement Corporation; and (c) United Booking Office, Incorporated (UBO) of which Select owned 50% and Marcus Heiman owned 50% of the capital stock.*

The allegations of the complaint are summarized adequately at pages 5 to 11 of the Government's brief. We have only the following to add:

Because the complaint is modeled after those in the various motion picture antitrust cases, it analyzes the legitimate theatre business in terms akin to the "production, distribution and exhibition" branches of the motion picture industry, by dividing the legitimate theatre business into three parts—production, booking and presentation. The result is a somewhat artificial and not entirely realistic description of how the business is conducted.

For "presentation" is not a function of the theatre owner and, in that respect, is unlike "exhibition" in the motion picture industry, where the theatre operator—and not the producer of the picture—puts on the show. Production and presentation in the legitimate theatre are in fact one function, which is performed by the producer who assembles and trains the cast and presents the play to the public. The other principal—and correlative—function is the operation of pieces of real estate, *i.e.*, theatres, where the plays may be performed.

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*Since the filing of the complaint, Lee Shubert has died and L. A. B. Amusement Corporation has been dissolved and its assets and business vested in Marcus Heiman personally. Otherwise, the interests of the several appellees are as stated in the complaint. Lee Shubert's executors have not been substituted as parties.

Nor is "booking" closely akin to "distribution" in the motion picture business, where the distributor maintains the inventory of films and "sells" and delivers them to the theatres, which have no contractual relations with the producer. Booking, though a difficult and important operation, is essentially the renting of theatres to play producers. It is a service given to local, intrastate businesses, functionally similar to the renting of rooms by a central agency of a chain of hotels, each of which is a local operation, not engaged in interstate trade or commerce.

Proceedings Below

On November 24, 1953, in reliance on *Toolson* v. *New York Yankees*, 346 U. S. 356, appellees moved to dismiss the complaint on the grounds (a) that the Court did not have jurisdiction of the subject matter of the action and (b) that the complaint did not state a claim upon which relief could be granted (R. 17).

The District Court (Judge Knox) granted the motion and filed the following opinion (R. 18):

> "In principle, I can see no valid distinction between the facts of this case and those which were before the Supreme Court in the cases of *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U. S. 200, and *Toolson* v. *New York Yankees, et al.*, decided by the Supreme Court on November 9, 1953.
>
> "Upon the authority of these adjudications the complaint in the above-entitled action will be dismissed."

Summary of Argument

POINT I—Prior decisions clearly establish that the Sherman Act is not applicable to the theatrical business.

POINT II—The prior decisions should be followed on the principle of *stare decisis*.

ARGUMENT

POINT I

PRIOR DECISIONS CLEARLY ESTABLISH THAT THE SHERMAN ACT IS NOT APPLICABLE TO THE THEATRICAL BUSINESS.

This Court in the *Toolson* case established the *Federal Baseball* case* as the law in 1953 by accepting it as a binding precedent, "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws" (346 U. S. at 357).

The Federal Baseball Case

This Court in the *Federal Baseball* case, in determining that Congress had not intended the Sherman Act to apply to baseball, did not rest its conclusion upon the legislative history of that Act or any other direct evidence of what Congress had or had not intended. It rested its conclusion upon the common understanding of the words "trade or commerce among the several States". It said that "trade or commerce", as Congress had used the words in the

**Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U. S. 200.

Sherman Act, did not include "personal effort, not related to production"; that the giving of local exhibitions for public entertainment was not an "interstate" matter; and that "the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business" (259 U. S. at 208-09).

The *Federal Baseball* case recognized that interstate activities were involved in the baseball business. Not only did the teams with their paraphernalia have to cross state lines, but it was necessary, as Mr. Justice Holmes said, to "arrange" for their doing so; and such arrangements, of course, involved the use of the mails and other media of communication, the making of interstate contracts and the other interstate activities which the Government has alleged in its complaint in the present case.

The "interstate commerce" allegations of the present complaint are summarized in par. 49 (R. 12); and all the interstate activities alleged are equally present in baseball:

> "In the course of producing, booking and presenting legitimate attractions [putting on exhibitions of baseball], there is a constant, continuous stream of trade and commerce between the States of the United States, consisting of the assemblage of personnel and property for rehearsals [practice], the transportation of said personnel and property to various cities throughout the United States, the making and performing of contracts under which attractions [baseball teams] are routed and presented in various States of the United States, and the transmission of applications, letters, memoranda, communications, commitments, contracts, money, checks, drafts and other media of exchange across State lines."

Thus the baseball business and the theatrical business are indistinguishable in their interstate commerce aspects. The interstate activities* are incidental, in that they are not ends in themselves—the object and end being the performances by living persons for the entertainment of other persons—but are made necessary for the most part by the fact that the places of exhibition are located in different States. The necessity of using interstate transportation and communication, according to the *Federal Baseball* case, "is not enough to change the character of the business" (259 U. S. at 209). "That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place" (id.).

The principle was stated by Mr. Justice Holmes in general terms, and was in no wise confined to baseball. He used the following analogies to support his argument (id.):

> "To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State."

Other analogies found in the lower court's opinion, which this Court said "went to the root of the case", and which it found to be "correct", were of college football games, grand opera and the theatre (269 Fed. at 685-6).

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*One important interstate activity involved in baseball—not merely as an incident to the giving of local exhibitions, but as an independent source of revenue—is not found in the theatrical business: Performances of plays or musical shows in legitimate theatres are not broadcast over the radio or television.

Earlier Authorities

The decision of the lower court in the *Federal Baseball* case was not novel at the time when it was rendered, but was supported by earlier authorities which had dealt with the problem of whether the legitimate theatre, grand opera, vaudeville and baseball constituted "trade" or "commerce":

In re Oriental Society, Bankrupt, 104 Fed. 975 (E. D. Pa. 1900)—legitimate theatre.

People v. *Klaw*, 55 Misc. 72 (N. Y. Gen. Sess. N. Y. Co. 1907)—vaudeville.

American League Baseball Club v. *Chase*, 86 Misc. 441 (Sup. Ct. Erie Co. 1914)—baseball.

Metropolitan Opera Co. v. *Hammerstein*, 162 App. Div. 691 (1st Dept. 1914)—grand opera.

In re Oriental Society, Bankrupt, supra, turned on whether a theatrical company was engaged in "trading, * * * or mercantile pursuits", within the meaning of the Bankruptcy Act of 1898. It was argued that the producer had to buy scenery which, when the play had run its course, he would sell; but it was pointed out that the producer was not in the business of buying and selling scenery; and that therefore the purchase, interstate transportation and sale of the scenery was a mere incident to his proper business, insufficient to change its character.

The judges in the early cases, who were closer than we are today to the commonly accepted meaning of "trade or commerce" when the Sherman Act was passed, and during the early days of its enforcement, regarded such activity as the giving of theatrical performances as being "as far

removed as possible from the commonly accepted meaning of trade and commerce". See *Metropolitan Opera Co. v. Hammerstein, supra,* at 695.

The Marienelli Case

Prior to *Federal Baseball* there had been one antitrust case holding that the Sherman Act did apply to the theatrical business—the decision of Judge Learned Hand in *Marienelli v. United Booking Offices,* 227 Fed. 165 (S. D. N. Y. 1914). Plaintiff was a booking agent for vaudeville acts, and the principal defendants were the two large vaudeville circuits (Keith and Orpheum) and their booking agencies. The charge was that the defendants had combined and conspired to monopolize all vaudeville booking and to exclude plaintiff from it, and that they had blacklisted him and destroyed his business.

The business of plaintiff and the defendant booking agencies was to arrange interstate tours for vaudeville troupes and individual performers. Judge Hand, in overruling a demurrer to the complaint, analyzed the problem in terms of "direct" and "indirect" effects on interstate commerce; he held that the contracts made by the booking agents were performed as much by interstate transportation of the vaudeville actors and their paraphernalia as by the giving of performances; and he concluded that the alleged conspiracy was a "direct", rather than an "indirect", restraint of interstate commerce. Judge Hand did not decide the question that Mr. Justice Holmes later found determinative of the *Federal Baseball* case—whether the giving of local performances was "trade or commerce"; he treated them as an intrastate phase of the business.

The reasoning of the *Marienelli* case was urged on the courts in the *Federal Baseball* case, but it was not accepted; and the case has never been followed.*

Hart v. *Keith Exchange* (*262 U. S. 271*)

The Government's position is that the *Toolson* case applies exclusively to the baseball business and has no application to any other business, however similar it may be to baseball in its interstate commerce aspects; that previous cases (and in particular the *Hart* case) did not establish an exemption of the theatrical business from the Sherman Act; and that therefore this Court should now examine the problem without reference to the principle of *stare decisis*.

As the Government reads this Court's decision in *Hart* v. *Keith Exchange*, not only does it *not* establish the exemption of the theatrical business from the Sherman Act; it establishes just the contrary—that the legitimate theatre is within the Act.

The point is asserted repeatedly in the Government's brief. At page 11 it is said that the *Hart* case "established that the theatrical business, in its interstate aspects, is subject to the [Sherman] Act"; at page 17 that, at least since the decision in the *Hart* case, "it has been established * * * that the theatrical business, in its interstate aspects, is subject to the federal antitrust laws". At page 22, with reference to the decision of the Court of

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*We do not know what the Government means in its footnote on page 20, to the effect that this Court's decision in *Hart* v. *Keith Exchange*, "was perhaps foreshadowed" by *Marienelli*. As we show in the discussion which follows, the *Hart* case was decided by this Court on a basis that rejected not only the reasoning of the *Marienelli* case but also its holding that the ordinary activities of vaudeville booking agents—whether or not they were "incidental" to the local business—amounted to interstate commerce.

Appeals* after trial of the *Hart* case, which this Court refused to review by certiorari—and which held that the theatrical business was not trade or commerce within the Sherman Act, because all the interstate activities found to be present were "incidental"—it is said that "this Court had held the contrary in the prior appeal in the very case."

Then at page 27 we are charged with asking the Court "to hold now, for the first time since the Sherman Act was enacted in 1890, that the Act does not apply to [the theatrical] business"; and then it is said: "The only pertinent decision by this Court—the *Hart* case in 1923—indicated that the theatrical business in its interstate aspects was not immune from the Act." Finally, at page 35, it is said that *Federal Baseball*—insofar as it reflects the view that the Sherman Act is not applicable to businesses involving "exhibition" or "personal effort"—had been "undermined" in the subsequent cases, including the *Hart* case.

At no point in the brief, however, does the Government attempt to analyze the *Hart* decision in the light of the facts alleged, the arguments presented to the Court, and the meaning of Mr. Justice Holmes's opinion in the context of the whole body of relevant decisions.

Such an analysis shows that the arguments of the Government are erroneous and that the *Hart* case, far from being an authority in the Government's favor, was a reaffirmation of the *Federal Baseball* case and a clear adjudication of its applicability to the theatrical industry.**

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*12 F. 2d 341.

**The Government in its brief employs a curiously distorted form of expression with reference to the argument that we made in our Motion to Affirm, pp. 8-11, with respect to the later proceedings and the denial of certiorari in the *Hart* case. They attribute to us the argument "that the subsequent history of the *Hart* litigation vitiates its value as a precedent" (Gov. br. p. 21). We did not so argue, because we regard the original *Hart* decision as a clear precedent in our favor, and we consider that it was fortified by the subsequent proceedings.

When the *Hart* case first came on for trial in the District Court, before Judge Mack, the defendants moved to dismiss the complaint on the authority of the *Federal Baseball* case, while plaintiff urged that Judge Learned Hand's decision in *Marienelli* was correct and should be followed, since the conspiracy alleged in *Hart* was substantially identical with that alleged in *Marienelli*, and involved the same phase of the vaudeville branch of the theatre business. In both cases the plaintiffs were booking agents and the defendants were the Keith and Orpheum Circuits and their booking agencies.

Judge Mack granted the motion to dismiss, citing *Federal Baseball* as having overruled *Marienelli*:*

> "If the criterion laid down by Judge Hand in his decision in the *Marienelli* case had been adopted by the Supreme Court, this case would be clear, because it falls clearly within the *Marienelli* case. In my judgment, however, the Supreme Court in the baseball case has not adopted that criterion, but it adopted one which practically is that the dominant object of the parties in respect to the matters complained of must affect or be interstate commerce; and in my judgment, that is so neither in the case of the defendants nor in the case of the plaintiff."

On his appeal to this Court, plaintiff Hart again urged the *Marienelli* case, and took the broad position that the theatrical industry must be distinguished from baseball because a vaudeville act was something that could be bought, sold and traded in. As it was put in the appellant Hart's brief (p. 13):

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*Printed at p. 27 of the brief for Orpheum Circuit, Inc., et al., before the Court of Appeals in *Hart* v. *Keith Exchange*, (__ F. 2d 341). An error in spelling "Marienelli" has been corrected.

> "For, a vaudeville act or production, as defined in this complaint, is essentially a *product* of human effort; it is a commodity in which the property rights of the owners are recognized and protected by law. It is a commodity that is bought and sold, licensed and rented for hire; it is an element of economic wealth; it is property."

Upon that premise appellant Hart argued, following the reasoning of *Marienelli*, that the conspiracy which excluded him from the booking business—which allegedly prevented him from sending his clients on interstate tours to play in vaudeville houses—was a "direct" interference with interstate commerce.

In writing the opinion for this Court, Mr. Justice Holmes ignored the issue thus tendered, and framed an issue for the Court in terms of a much more restricted argument derived from appellant's brief, in which various types of vaudeville acts were described in terms of whether they involved much or little transportation of paraphernalia, and whether the actors or the paraphernalia were more important. At one end of the scale was the monologuist, who had to carry only the clothes in which he appeared on the stage; at the other end was the "Saw-the-Woman-in-Half" act—an arrangement of apparatus in which mirrors produced the illusion that the lady was being bisected—where only the paraphernalia had to be moved across State lines, the lady in the box and the man with the saw being available locally.*

*Other examples of what Mr. Justice Holmes may have had in mind when he referred to cases where "in the transportation of vaudeville acts the apparatus sometimes is more important than the performers" are "Old Ninety and Nine", which simply displayed a locomotive, and "The Toonerville Trolley", which featured a trolley car. Brief for petitioner *Hart* in 262 U. S. 271.

From the factual distinctions thus made, Mr. Justice Holmes formulated the issue in the following terms (*202* U. S. at *272-73*; emphasis ours):

> "* * * It is alleged that a part of the defendants' business is making contracts that call on performers to travel between the States and from abroad and in connection therewith require the transportation of large quantities of scenery, costumes and animals. Some or many of these contracts are for the transportation of vaudeville acts, including performers, scenery, music, costumes and whatever constitutes the act, so that it is said that there is a constant stream of this so-called commerce from State to State. The defendants contend and the judge below was of opinion that the dominant object of all the arrangements was the personal performance of the actors, all transportation being merely incidental to that, and therefore that the case is governed by *Federal Base Ball Club* v. *National League*, 259 U. S. 200. On the other hand it is argued that in the transportation of vaudeville acts *the apparatus sometimes is more important than the performers* and that the defendants' conduct is within the statute *to that extent* at least."

Mr. Justice Holmes apparently did not consider that the argument based on *Marienelli* required attention, perhaps because the same argument had been so clearly made and rejected in *Federal Baseball* the year before. In any event, he did ignore it, and the principle that he laid down for the lower court to apply on the remand was simply that "non-incidental" activities in interstate commerce may bring persons, not otherwise engaged in "trade or commerce", into conflict with the Sherman Act.

In substance, Mr. Justice Holmes informed the trial court that the jurisdictional question should be decided on the evidence and, to use his words, that if anything could "be extracted from this bill that falls under the act of Congress", it should be "considered independently" (id. at 274).

Thus the Court's reversal of Judge Mack's decision was placed upon a ground that was very narrow—first, because the only jurisdictional inquiry that the trial court on remand was required to make was whether there were interstate activities in the business that passed the bounds of the "incidental", so that they had to be considered "independently"; second, because—faced with a 55-page complaint of "superfluous length" (id. at 272), and replete with all sorts of allegations about interstate matters—the Court's ultimate reason for the reversal was "that we are not prepared to say that *nothing can be extracted* from this bill that falls under the act of Congress, or *at least* that the claim is wholly *frivolous*" (262 U. S. at 274; emphasis ours).

Hart v. *Keith* did not qualify the *Federal Baseball* case in any way, nor did it impair its authority on the propositions (1) that the giving of local performances by living players for public entertainment is not "trade or commerce" under the Sherman Act and (2) that interstate commerce which is merely incidental to the local business—which occurs only because the places of entertainment are in different States—does not bring the business under the Sherman Act. *Hart* v. *Keith* merely added another proposition of law to those two, namely, (3) that where the interstate activities of a business like the theatre business go beyond the "incidental", they must be judged "independently" of the main business, and they may constitute interstate trade or commerce though the principal business does not. The third

proposition is necessarily implicit in the second. For if the interstate activities of a business like baseball or the theatre are held to be outside the Sherman Act *because* they are "incidental", then it follows that, when they cease to be incidental, they cease to be outside the Act.

A good example of the "non-incidental" type of activity is found in the recent case of *United States* v. *National Football League,* 116 F. Supp. 319 (E. D. Pa. 1953), in which the Government charged that the National Football League and its constituent teams were violating the Sherman Act—not in conducting their business of presenting football games, but in imposing restraints on broadcasting of the games by radio and television. The District Court did just what Mr. Justice Holmes had indicated in *Hart*—it "considered independently" the question of whether the restrictions on broadcasting—a "non-incidental activity"—violated the Sherman Act. It held that unreasonable restrictions violated the Act whether or not the *Toolson* case applied to professional football.

To put the point of the *Hart* case in another way: When this Court limited the jurisdictional issue on the remand to a determination of whether the theatrical business involved interstate activities that went beyond the "incidental", it necessarily held that "incidental" activities would not bring the business within the Sherman Act *because* the giving of local theatrical performances was not "trade or commerce".*

Thus *Hart* v. *Keith Exchange*—instead of establishing, as the Government asserts, that the theatrical business is

*In the present case, the Government has not charged that the defendants engaged in any interstate activity that was not incidental to the business of giving performances of plays in theatres in various cities or was not attributable to the fact that the cities in which legitimate theatrical performances are given are located in different States.

within the Sherman Act with respect to its ordinary activities—established just the opposite.

This Court's decision in *Hart* was so understood by the first judge who was called upon to apply it—Judge A. N. Hand, to whom the case was assigned for trial after remand to the District Court. After hearing the plaintiff's testimony, he granted defendants' motion to dismiss with the following statement (Record in 12 F. 2d 341, fols. 3222-24):

> "I will dismiss on the ground that the Interstate Commerce shown is incidental to the primary thing, that of entertainment. I think the Baseball case on this record requires that. Mr. Justice Holmes writing in the Supreme Court in this case (Hart v. Keith) decided nothing more than that upon the complaint with its extensive allegations relating to interstate commerce the trial court ought to have gone into the facts, and not have dismissed on the pleadings.
>
> "The decision of the Supreme Court in the Binderup vs. Pathe Exchange (263 U. S. 291) case is based, in my opinion, upon the fact that the subject there was the shipment of motion pictures, and the decision of the Supreme Court in the case of Rankin Co. vs. Billposters Co. (260 U. S. 501) is likewise based upon the ground that the shipment of posters was there a primary rather than an incidental subject of the action."

The Court of Appeals affirmed. It stated that the issue was whether the rule of *Federal Baseball* applied, and said that depended on whether, as the defendants argued, the transportation of the paraphernalia of vaudeville in interstate commerce was incidental to the business of giving local performances of vaudeville acts, or whether the alleged

conspiracy was in fact "an interference with interstate movement of stage properties or paraphernalia used in the vaudeville theatrical business" (12 F. 2d at 344). The Court decided that the latter was not the fact—that all interstate activities shown by the evidence were "incidental".*

This Court denied certiorari. We said in our Motion to Affirm that we did not draw the prohibited inference from the denial of certiorari, but pointed out that the necessary effect of that denial was to permit the doctrine of the *Federal Baseball* case to become the law in the theatrical business—at least in the Circuit in which the major activities of that business are conducted. *Cf. Brown* v. *Allen*, 344 U. S. 443, 543 (Jackson, *J.*, dissenting).

The subsequent cases may be reviewed briefly:

Except for *Ring* v. *Spina*, 148 F. 2d 647 (2d Cir. 1945), and *Gardella* v. *Chandler*, 172 F. 2d 402 (2d Cir. 1949), all of them—involving baseball, Chautauqua, the theatre and grand opera—followed the doctrine of the *Federal Baseball* case.

The baseball cases are:

Gardella v. *Chandler*, 79 F. Supp. 260 (S. D. N. Y. 1948), reversed in case cited *supra;* denial of motion for injunction *pendente lite* affirmed, 174 F. 2d 919 (2d Cir. 1949), upon authority of *Martin* case, next cited;

Martin v. *National League Baseball Club*, 174 F. 2d 917 (2d Cir. 1949), affirming *Martin* v. *Chandler*, 1948-1949

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*The Court also expressed its views on the merits, unnecessarily in view of its decision on jurisdiction.

CCH Trade Cases par. 62,397 (S. D. N. Y. 1949) (not reported officially);

Kowalski v. *Chandler*, 202 F. 2d 413 (6th Cir. 1953), affirming an unreported District Court decision (S. D. Ohio 1953);*

Corbett v. *Chandler*, 202 F. 2d 428 (6th Cir. 1953), affirming an unreported District Court decision (S. D. Ohio 1953);*

Toolson v. *New York Yankees*, 101 F. Supp. 93, affirmed *per curiam*, 200 F. 2d 198, affirmed *per curiam* 346 U. S. 356.

The Chautauqua case is *Neugen* v. *Associated Chautauqua Co.*, 70 F. 2d 605 (10th Cir. 1934).

The case involving the legitimate theatre is *Ring* v. *Spina* in the District Court (unreported),** reversed in *Ring* v. *Spina*, *supra*.

The case involving grand opera is *Conley* v. *San Carlo Opera Company*, 163 F. 2d 310 (2d Cir. 1947), affirming 72 F. Supp. 825 (S. D. N. Y.).

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*Affirmed together with *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356.

**The applicable portion of the opinion of Judge Caffey in the District Court, printed in the transcript of record in *Ring* v. *Spina* (148 F. 2d 647), is as follows (pp. 103-4):

> "It seems to me it has been settled by the Circuit Court of Appeals for the Second Circuit, whose decisions bind me, that none of the transactions alleged in the complaint with respect to the play involved was an act of interstate commerce. I conceive of no ground for distinguishing the case (*Hart* v. *B. F. Keith Vaudeville Exchange*, 12 Fed. (2) 341, 344, cer. denied 273 U. S. 703, 704. See also *Federal Club* v. *National League*, 259 U. S. 200, 208-9, and *Metropolitan Opera Co.* v. *Hammerstein*, 162 App. Div. 691, 694-5, affd. 221 N. Y. 507). If this be true, then it seems to me the plaintiff is not entitled to recover."

In the *Gardella* and *Ring* cases in the Circuit Court of Appeals, there were opinions questioning the authority of the *Federal Baseball* case as a precedent.

The variant views of Judges Learned Hand, Chase and Frank in the *Gardella* case were before the Court in *Toolson,* and it seems unnecessary to comment on them in this brief. It may be sufficient to point out that all three judges agreed that *Federal Baseball* was a binding precedent if not distinguishable—as Judge Frank thought it was, and Judge Learned Hand thought it might be, by reason of the part played by radio and television broadcasting in the baseball business. See *Martin* v. *National League Baseball Club, supra* at 918, for a summary by Judge Hand of the three points of view.

Ring v. *Spina*

Ring v. *Spina,* which arose out of a dispute over rights in a play for the legitimate theatre, was a treble damage suit under the Sherman Act, based on alleged invalidity of the Minimum Basic Agreement of the Dramatists' Guild.

The District Court (Judge Caffey) denied a motion for an injunction pending trial, on the ground that *Hart* v. *Keith Exchange* (12 F. 2d 341) required him to hold that none of the transactions alleged in the complaint was "an act of interstate commerce". The court also cited *Federal Baseball* and *Metropolitan Opera Co.* v. *Hammerstein, supra,* in support of that conclusion.

The Court of Appeals (Judges Evans and Clark sitting) reversed, holding in substance that the theatrical business

was in fact in interstate commerce and under the Sherman Act.

Judge Clark wrote the opinion, expressing doubt that the *Hart* and the *Federal Baseball* cases were still good law, but interpreting them as holding only "that contracts for the personal services for exhibition purposes of vaudeville and baseball artists were not in interstate trade or commerce" (148 F. 2d at 650); and he went on to distinguish between a simple contract of that kind and the whole business of producing a musical comedy. His analysis in that respect was quite contrary to the reasoning of the *Hart* cases and the *Federal Baseball* case, because none of the opinions in those cases raised or decided the question of whether players' contracts were in interstate commerce, as distinguished from the businesses themselves being "trade or commerce".

Whatever authority *Ring* v. *Spina* might have had, before the *Toolson* case, was considerably weakened when it came up to the Court of Appeals again after trial. *Ring* v. *Authors' League of America*, 186 F. 2d 637. Without going into detail, it may be sufficient to say that the posture of the case was such that it might have been a precedent for the Dramatists' Guild's being held to be a combination in restraint of trade. Judge Learned Hand, in an opinion for the unanimous court, questioned whether the court "should decide issues in which the plaintiff has only the most shadowy interests", ordered the judgment modified to exclude a provision that was a measure of antitrust relief, and said (p. 643):

> "* * * However, we hasten to add that we leave open all legal questions which such issues involve;

> we wish to make it entirely clear that we are not to be understood either to throw any doubt upon, or to affirm, what we said when we granted the temporary injunction; we merely decide that the necessity for such affirmance does not arise."

As we read Judge Hand's words, they mean that *King* v. *Spina* was not to be understood as deciding anything, one way or the other, on the antitrust issues that had been discussed in the opinion.*

The special characteristics of the theatrical business—how it operates, who in the business performs this function or that, what use it makes of the mails, of interstate transportation and of other instrumentalities of "interstate commerce"—have been subjects of examination by the courts from time to time over a long period of years.

Over the years the decisions applicable to baseball and those applicable to the theatre have been inextricably interwoven. The Court of Appeals in its decision in the *Federal Baseball* case relied in part on the earlier cases involving the theatre; and when *Federal Baseball* was argued before this Court, Mr. George Wharton Pepper, attorney for the baseball interests, relied heavily on the analogy of the theatre—citing not only the theatre cases but also a series of rulings of the Attorney General, to the effect that the

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*A mistake in the Government's brief creates the erroneous impression that Judge Clark's decision in *King* v. *Spina* (148 F. 2d 647) was taken up to this Court on a petition for certiorari, and that certiorari was denied. Actually, the decision of Judges Evans and Clark in 148 F. 2d was the only one of three Court of Appeals decisions in the *King* litigation that was not taken up on a petition for certiorari. The citations for the two that were taken up are 166 F. 2d 546 (involving the right to a trial by jury), *cert. den.* 335 U. S. 813, and 186 F. 2d 637 (referred to in the text, opinion by L. Hand, C. J.), *cert. den.* 341 U. S. 935.

theatrical business was not within the Sherman Act.* In the *Hart* case, of course, *Federal Baseball* was the main reliance of the defendants and was the authority upon which the Court of Appeals, having found only "incidental" interstate commerce to be present on the facts, decided the case in their favor; and in the *Toolson* case the respondents (Brief, pp. 37, 39 and 40), cited and relied in part on the theatre cases.

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*Three separate rulings of the Department of Justice, to the effect that the theatrical business was not within the Sherman Act, were made by three Attorneys General in 1911, 1917 and 1920. The last was made in response to a request by the Federal Trade Commission as to whether it had jurisdiction over a proceeding before it (F. T. C. Docket No. 128-1918) in which the Vaudeville Managers' Protective Association was charged with violations of the antitrust laws. A copy of that ruling was submitted to the District Court in this case and its authenticity was admitted by the Government. It reads as follows:

April 2nd, 1920.

Hon. Victor Murdock,
Chairman, Federal Trade Commission,
Washington, D. C.

Sir:

Receipt is acknowledged of your favor of March 27th transmitting your records in the case of the *Federal Trade Commission* v. *The Vaudeville Managers' Protective Association, et al.*

This subject has previously been considered by the Department, and my predecessors on January 28, 1911, and again on March 24, 1917, took the view that the business of presenting and executing theatrical entertainment is not commerce within the constitutional sense, and that, therefore, such a combination as that involved in this case does not fall within the Acts of Congress prohibiting combinations in restraint of interstate commerce.

I see no reason to depart from the views of my predecessors, and, therefore, I am returning herewith your records.

Respectfully,

(Signed) C. B. Ames,
Assistant to the Attorney General.

Enclosure 16972.

Throughout the whole course of decision, no Court has yet found a distinction that would place the one business outside the Sherman Act and the other within it. The reasoning of Mr. Justice Holmes in *Hart* v. *Keith Exchange* would have been equally applicable to a case involving baseball, if "non-incidental" interstate commerce had been alleged. And neither in the *Marienelli* case nor in the opinion of Judge Clark in *Ring* v. *Spina* is there any suggestion of a basis of distinction between baseball and the theatre. The reasoning of *Marienelli* would have brought baseball under the Sherman Act; and that of Judge Clark would have destroyed *Federal Baseball* as a precedent equally with *Hart* v. *Keith*.

It can be said of *Federal Baseball*, the *Toolson* case and the two decisions in *Hart* v. *Keith Exchange*—as this Court said of the *Schwimmer*, *Macintosh* and *Bland* cases* in its opinion in *Girouard* v. *United States*, 328 U. S. 61, 63—that:

> "* * * the principle emerging from the three cases obliterates any factual distinction among them. * * * they stand for the same general rule * * *"

The Government in its brief seeks to escape the force of the authorities by citing cases which are similar to the theatrical business in respect of the type of work that is done in preparing what it calls the "product", specifically, book publishing (pp. 36-37) and motion pictures (pp. 32-33). But such cases are no more in point here than they were in the *Toolson* case. In book publishing, the end re-

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United States v. *Schwimmer*, 279 U. S. 644; *United States* v. *Macintosh*, 283 U. S. 605; and *United States* v. *Bland*, 283 U. S. 636.

sult is a physical thing that is bought and sold in interstate commerce like any other merchandise. No one would suggest that the fact that the product is sold at "local" bookstores is significant; most consumers' goods that move in interstate commerce are sold at local retail stores.

The Government's argument misses the point that, just as baseball is a sport, so the theatre is an art—a form of human expression, a means of communicating thought and emotion from living human beings to other living human beings. Its products are not embodied in physical things that are bought and sold in trade or commerce. They are intangible and evanescent, unique and individual. The play —the "independent product", as the Government calls it (Br. p. 33)—does not exist until the curtain rises and living men and women commence to act their parts; it ceases to exist when the curtain goes down on the last act.

In spite of its close relation to the theatre, the motion picture industry is different from it in the most significant particular—the fact that the motion picture film is an article of trade, not in any metaphoric sense, but in the real sense that it is an end product of a manufacturing process, which is "sold" and physically delivered to the customers from whom the producer derives his revenue—the theatres. A motion picture is an artificially created series of photographs of scenes and actions. Each of them has been rehearsed, acted and re-acted, photographed and re-photographed, then put together physically into a connected whole, then edited and cut, added to by retakes and finally made into the finished thing. The result is a stereotype; it may be shown from the film at any given time, in identical form, in as many places throughout the country as there are copies of the film. It is an inanimate

thing—a reel of photographic film in a metal box—which moves into interstate commerce like any other manufactured product.

But a play in the legitimate theatre, like a baseball game, is an experience of living people.

POINT II

THE PRIOR DECISIONS SHOULD BE FOLLOWED ON THE PRINCIPLE OF *STARE DECISIS*.

This Court, not only in the *Toolson* case but also in *Federal Baseball* and *Hart* v. *Keith Exchange*, rested its decisions on a construction of the Sherman Act. The power of Congress under the Commerce Clause was not in question; and in *Toolson* the Court's reasoning assumed that Congress, if it chose to do so, could bring the baseball business under the Act. The same assumption was made in the presentation of this case before the District Court and is made here.

Thus the special considerations that affect the application of *stare decisis* in Constitutional cases are not germane.* All that is involved is whether a settled construction of a statute shall be adhered to.

Since *stare decisis* is the very cornerstone of our Anglo-American system of justice, the cases that apply the principle are, of course, infinitely more frequent than those that discuss it; and when discussion occurs, it is in cases where the wisdom of following an established rule has been questioned, and the discussion is generally in specific terms.

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*See *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 407-8, Brandeis, J., dissenting.

But the principle that runs through the decisions seems to be this—that a settled construction of a statute will be followed unless there are strong reasons for deviating from it. As Mr. Justice Cardozo put it, "Adherence to precedent should be the rule and not the exception."*

In the words of Mr. Justice Brandeis, dissenting in *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406:

> "*Stare decisis* is usually the wisest judicial policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. Compare *National Bank* v. *Whitney*, 103 U. S. 99, 102. This is commonly true even where the error is a matter of serious concern providing correction can be had by legislation."

In a case like this, where there are precedents of long standing, it is better to leave the remedy to the legislature. *Cleveland* v. *United States*, 329 U. S. 14; *Screws* v. *United States*, 325 U. S. 91; and see *Commissioner* v. *Estate of Church*, 335 U. S. 632, 676-7, per Frankfurter, *J.*

This case does not relate to one of those remote corners of the law, which Congress might be likely to overlook because of its pre-occupation with other areas; it has to do with the applicability of an important federal statute to a business that is constantly in the public eye—a business to whose activities the newspapers and magazines of the country devote constant and considerable attention. If there are evils to be remedied, they are not likely to escape public notice or Congressional correction. "When the evil is defined and generally recognized", said Chief Justice Stone,**

*The Nature of the Judicial Process, p. 149.

**"*The Common Law in the United States*, 50 Harv. L. Rev. 4, 9 (1936).

"legislatures have not been slow to effect reforms which courts have been unwilling or have not felt free to make * * *."

This case is a stronger one for the application of *stare decisis* than was *Toolson*. For *Toolson* raised only the question of whether to follow a precedent or overrule it. It was the usual case where the wisdom of an established statutory construction is called into question, and the Court must balance the considerations that might make a change in the law desirable against the considerations of uniformity and stability which are at the root of the *stare decisis* principle.

Those are the considerations that this case would have involved if *Toolson* had not been decided. But the *Toolson* case applied the *stare decisis* rule upon facts which in their legal significance, under all the authorities, are indistinguishable from those here present; and so this case presents a situation in which there are two grounds for application of the doctrine, (1) the course of decision which gave the statute its interpretation and (2) the prior holding that that interpretation must be adherred to on the *stare decisis* principle.

It is submitted that the *Toolson* case not only supports the application of *stare decisis* here, but compels it. For if the doctrine is not applied, there will be not only different rules of law for baseball and the theatre under the Sherman Act, but there will be different rules of *stare decisis* for the two types of business.

The Government's Three Distinctions

The Government argues that the *Toolson* case was an "exceptional" application of the doctrine of *stare decisis*,

based upon the presence of "a combination of three principal factors, peculiar to the situation of baseball, which justified the decision"; and it says that none of the factors, which are stated as follows, is present in this case (Gov. Br. p. 17):

(1) Prior decision by this Court as to the specific business involved;

(2) Subsequent Congressional consideration; and

(3) Reliance on this Court's prior decision.

We submit that under none of the three headings has the Government shown any significant difference between the *Toolson* case and the present one.

Prior Decision of this Court as to the Specific Business

Stare decisis is not a rule that can be applied industry by industry or case by case. It is not limited, like *res judicata*, to the facts of particular cases. It is a doctrine of adherence to legal principles. The fact that the present case involves a different business from the *Federal Baseball* case cannot be of significance unless the *determinative facts* in the two cases are so distinguishable as to call for application to one of legal principles not applicable to the other.

It has been shown, we submit, that baseball and the theatre are not so distinguishable; and if more were needed to prove that point it would be found in the fact that the Government in its brief has not stated a single particular in which performances in the legitimate theatre partake of the character of "trade or commerce" more fully than baseball, or a single particular in which there are "non-incidental" interstate activities in the theatre business—or any "interstate commerce" at all which is not attributable to the fact that the

persons involved and their paraphernalia must travel from State to State to give their scheduled performances in different cities.

Subsequent Congressional Consideration

In its argument under this heading—and in fact in the heading itself—the Government departs a long way from the emphasis of the *Toolson* opinion. What this Court said (at p. 357) was that "Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect". As we read that statement in the light of the history of the subject, the emphasis is on the second part of the sentence and not the first.

For it would not seem that great weight could attach to the "subsequent Congressional consideration" upon which the Government leans so heavily (Br. p. 18)—the investigation* and report** of the Celler Subcomittee on Study of Monopoly Power.

The Celler Committee's report certainly does not meet the test which the Government states in its footnote (Gov. Br. p. 18), of constituting "specific legislative history reflecting clear and unequivocal affirmation of the decision". For the Subcommittee (Report, p. 135) expressed doubt that the *Federal Baseball* case was still good law in 1952.

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*Hearings before the Subcommittee on Study of Monopoly Power of the Committee on the Judiciary, House of Representatives, 82nd Cong., 1st Sess., Serial No. 1, Part 6, "Organized Baseball".

**Organized Baseball, Report of the Subcommittee on Study of Monopoly Power of the Committee on the Judiciary Pursuant to H. Res. 95 (82nd Cong., 1st Sess.), p. 135.

pointing out that in the 30 years following that decision there had been important changes both in the operations of organized baseball and in this Court's interpretation of the scope of statutes enacted to regulate interstate commerce; and the conclusions of the report, which opposed legislation that would give organized baseball *complete* immunity from the antitrust laws, included the following (p. 231):

> "There is, however, no need to enact a special rule of reason for baseball unless such a rule is not already applicable to this industry. Organized baseball, represented by eminent counsel, has assured the subcommittee that the legality of the reserve clause will be tested by the rule of reason. Though lawsuits have been filed against organized baseball in recent years, in none of them has the court yet passed on the reasonableness of the reserve clause. The Department of Justice has not disputed baseball's position that the reserve clause is legal under the rule of reason.
>
> "It would therefore seem premature to enact general legislation for baseball at this time. Legislation is not necessary until the reasonableness of the reserve rules has been tested by the courts. * * *"

The reasoning by which the Government reaches the conclusion—if that, indeed, is its conclusion—that Congress somehow approved or ratified the *Federal Baseball* decision escapes us. For we are unable to understand how such approval or ratification can result from a finding that the *Federal Baseball* case had probably ceased to be the law, and that Congress should *not* consider whether to restore the rule of that case *partially*, until the federal courts—in antitrust proceedings of which they would not have juris-

diction if the *Federal Baseball* case were good law—had thrown further light on the subject.*

With respect to the second part of the sentence quoted from the *Toolson* opinion—to the effect that Congress has not seen fit to bring baseball under the antitrust laws—it seems that the Court gave weight to that factor in spite of what was said in *Girouard* v. *United States, supra* at 69, and *Helvering* v. *Hallock,* 309 U. S. 106, at 119. For baseball (and the same is true of the theatre) is a medium of public entertainment and is the subject of wide public interest; and in the case of such a business it may fairly be inferred that the failure of Congress to amend the statute was not due to ignorance of its interpretation.

It would appear to be within the bounds of propriety for this Court to notice judicially that public interest in baseball extends throughout the body politic, from the lowliest to the most exalted—into the halls of our deliberative assemblies and, by common report, the higher realms of the judiciary. It would seem equally within the bounds of propriety for this Court to notice judicially that the legitimate theatre is also the subject of wide public interest.

Reliance on this Court's Prior Decision

The Government makes the flat statement (Br. p. 19) that:

> "Professional baseball, in its development since 1922, could and did rely on the flat holding in the *Federal Baseball* case that it was not subject to the antitrust laws."

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*We note also that the *Toolson* case and its two companion cases (*Kowalski* and *Corbett*, cited *supra*) had been decided by the District Courts before the Celler Subcommittee commenced its hearings on July 30, 1951.

and at pp. 11 and 25, it talks about "baseball's reliance" and "baseball's development in reliance" on the *Federal Baseball* case, as if it were dealing with a matter on which this Court had made a finding of fact.

It may well be that the baseball industry did rely on the *Federal Baseball* case and mold its development on the conscious assumption that the federal antitrust laws did not apply to it—though it is difficult to see how such reliance could be proved, even if testimony on the matter could properly be taken for the purpose of determining whether *stare decisis* should apply.

But this Court did not say that baseball *had* developed for 30 years in reliance on the *Federal Baseball* case. What the Court did say (346 U. S. at 357), after pointing out that Congress had not taken steps to repeal the *Federal Baseball* ruling by legislation, was that:

> "The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation."

In other words, baseball was *left to develop* on that understanding; and that is certainly the fact. It is equally the fact that the theatrical business—at least from the time of the second decision in the *Hart* litigation—was *left to develop* upon the understanding that its status under the Sherman Act was the same as baseball's; and the subsequent cases, cited above, show that the lower courts shared that understanding.

It is submitted that the Government's three "distinctions" do not distinguish, and that the case for *stare decisis* is as strong here as it was in *Toolson*, independently of the weight that must be given to the *Toolson* case itself; and

that, with the Toolson decision in the books, the case for *stare decisis* is compelling.

Speaking of the evils that result from overruling earlier considered decisions, Mr. Justice Roberts, joined in dissent by Mr. Justice Frankfurter, said in *Mahnich* v. *Southern Steamship Co.*, 321 U. S. 96, 113, that apart from the difficulties resulting to lower courts, litigants and counsel,

> "* * * the more deplorable consequence will inevitably be that the administration of justice will fall into disrepute. Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy. * * *."

We submit that neither the Bar nor the public would understand a refusal by this Court to follow the *Toolson* case upon the basis of any of the distinctions which the Government has made or suggested in its brief. The *Toolson* case would become a "sport in the law" (see *Screws* v. *United States, supra* at 112)—"a restricted railroad ticket, good for this day and train only" (see *Smith* v. *Allwright*, 321 U. S. 649, 669)—and good only for the interests who control the professional baseball leagues.

Stare decisis enables the Court to approach the ideal of equality before the law and to achieve a uniform application of the law to litigants, whatever their status. "There will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon."* By the same token, there will be no equal justice under law if what is *stare decisis* in 1953 is not *stare decisis* in 1954, or if a rule of law, which for over 40 years has always been held applicable equally to X and Y, is now held to be *stare decisis* for X, but not *stare decisis* for Y.

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*Douglas, *Stare Decisis*, 49 Col. L. Rev. 735, 736 (1949).

CONCLUSION

The judgment appealed from should be affirmed.

Respectfully submitted,

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September 23, 1954